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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 597

BORDEN'S FARM PRODUCTS COMPANY, INC.,
APPELLANT,

vs.

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 22, 1935.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, Defendants

AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

Borden's Farm Products Company, Inc. brings this its amended bill of complaint, pursuant to leave granted by an order made on December 26, 1934, against Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, and respectfully shows unto your Honors, as follows:

[fol. 2] First. The plaintiff, Borden's Farm Products Company, Inc., was at all times hereinafter mentioned and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State, and a resident of the Southern District of New York.

Second. The defendant, Charles H. Baldwin, is the duly appointed, qualified and acting Commissioner of Agricul-

ture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Commissioner in the Southern District of New York.

Third. The defendant, Kenneth F. Fee, is the duly appointed, qualified and acting Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Director in the Southern District of New York.

Fourth. The defendant, John J. Bennett, Jr., is the duly elected, qualified and acting Attorney General of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Attorney General in the Southern District of New York.

Fifth. The defendant, William C. Dodge, is the duly elected, qualified and acting District Attorney of the County of New York, and a citizen and resident of said State, and a resident of the Southern District of New York.

[fol. 3] Sixth. The ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in equity and arises under the Constitution of the United States, as will hereinafter more fully appear. The amount in controversy in this suit exceeds the sum or value of Three thousand dollars ($3,000), exclusive of interest and costs.

Seventh. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream and other dairy products in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has conducted its said business under the trade name "Borden's", which said trade name has been continuously used by the plaintiff and its predecessors in title for over fifty years. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk in bottles under its said trade name "Borden's" to consumers and to grocery stores, hotels,

restaurants, soda fountains, dairy products stores and similar mercantile establishments (hereinafter collectively referred to as "stores"). The plaintiff operates nine retail stores in the said City at which it sells to consumers fluid milk in bottles under its said trade name "Borden's".

Eighth. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has duly kept, observed and performed all the provisions of [fol. 4] said Sanitary Code and the regulations adopted thereunder.

Ninth. The plaintiff has expended large sums of money in the advertising of its said trade name "Borden's" and has created and developed a large and valuable trade and good will in connection therewith in the sale of fluid milk in bottles to stores in the City of New York and to consumers generally and at the retail stores operated by the plaintiff in the said City.

Tenth. On or about the 10th day of April, 1933, the Governor of the State of New York approved Chapter 158 of the Laws of 1933 enacted by the Legislature of said State, which said chapter amended the Agriculture and Markets Law, being Chapter 69 of the Consolidated Laws of New York, by adding thereto a new Article 25. A full, true and correct copy of said Chapter 158 of the Laws of 1933 is annexed hereto and marked "Exhibit A" and made a part hereof.

Eleventh. In and by the said Article 25 (Exhibit A), a new temporary state agency, known as the Milk Control Board, was created, to continue in existence until March 31, 1934, and was given power until said date to regulate as the emergency required all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New York. It was further provided in and by the said Article 25 that the said Milk Control Board should fix by official order the minimum wholesale and retail prices, and might fix by official order the maximum wholesale and retail prices, to be charged for milk handled within the State of

[fol. 5] New York for fluid consumption and wheresoever produced, including the wholesale and retail prices to be charged by milk dealers upon the sale of milk to stores either for consumption on the premises or resale to consumers and the prices to be charged by stores to consumers except for consumption on the premises.

Twelfth. In and by Subsection (c) of Section 317 of the said Article 25 (Exhibit A), it was provided:

"(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

Thirteenth. On or about the 5th day of May, 1933, the Milk Control Board adopted an order known as Official Order No. 12, a full, true and corect copy of which is annexed hereto and marked "Exhibit B" and made a part hereof. Under and by virtue of said Official Order No. 12 it was ordered and determined that the phrase "well advertised trade name" in the said Subsection (c) of Section 317 hereinabove set forth in paragraph Twelfth referred to the plaintiff and its trade name "Borden's" (in said order erroneously referred to as "Borden"), among others.

Fourteenth. On or about the 30th day of March, 1934, the Governor of the State of New York approved Chapter 126 of the Laws of 1934 enacted by the Legislature of said [fol. 6] State, which said Chapter amended the said Agriculture and Markets Law by repealing Article 21 and the said Article 25 (Exhibit A) thereof and by adding thereto a new Article 21 and a new Article 21-A. A full, true and correct copy of said Chapter 126 of the Laws of 1934 is annexed hereto and marked "Exhibit C" and made a part hereof.

Fifteenth. It is provided in and by the said Article 21 and Article 21-A (Exhibit C) that the functions, powers and

duties of the Milk Control Board created by the said Article 25 (Exhibit A),,except as modified in and by the said Article 21 and Article 21-A (Exhibit C), shall be exercised and performed by a division in the Department of Agriculture and Markets to be known as the Division of Milk Control. It is further provided that the Department of Agriculture and Markets through the Commissioner of Agriculture and Markets shall be vested with the powers theretofore conferred upon the Milk Control Board by the said Article 25 (Exhibit A), and that the said Commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of the said Article 21 and Article 21-A (Exhibit C).

Sixteenth. In and by Section 258-m of the said Article 21-A (Exhiibt C), it is provided:

"§ 258-m. *Orders fixing prices and handling charges for milk.*—The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The [fol. 7] commission shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

* * * * * * *

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, in-

cluding a reasonable return upon necessary investment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary."

Seventeenth. In and by Section 258-q of the said Article 21-A (Exhibit C), it is provided:

"It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Eighteenth. In and by Section 258-j of said Article 21 [fol. 8] (Exhibit C), it is provided that the rules and orders of the Milk Control Board in effect at the time of the transfer to the Division of Milk Control of the powers, duties and functions theretofore vested in the Milk Control Board or the Commissioner of Agriculture and Markets shall remain in full force and effect until otherwise provided by the said Commissioner.

Nineteenth. On or about the 5th day of June, 1934, the defendant, Charles H. Baldwin, as the Commissioner of Agriculture and Markets, adopted an order known as Official Order No. 74, a full, true and correct copy of which is annexed hereto and marked "Exhibit D" and made a part hereof. Under and by virtue of said Official Order No. 74 the said Commissioner purported to fix the minimum prices which could be charged in the City of New York on the sale of fluid milk in bottles by dealers to stores and the minimum prices which could be charged in the said City on the sale

of fluid milk in bottles by stores to consumers. In and by paragraph 14 of said Official Order, it is provided:

"14. In the City of New York only it shall not be unlawful for any milk dealer, who, since April 10, 1933, has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and the same difference may apply to sales of such milk in such city from stores to consumers."

A provision similar in all material respects to that contained in said paragraph 14 was contained in Official Order No. 35, as amended by Official Order No. 59, purporting to [fol. 9] fix the minimum prices which could be charged in the City of New York on the sale of fluid milk in bottles by dealers to stores and by stores to consumers, which Orders were superseded by said Official Order No. 74.

Twentieth. The said Official Order No. 12 (Exhibit B) and the said Official Order No. 74 (Exhibit D) are deemed by the defendants to be in full force and effect.

Twenty-first. Under and by virtue of said Section 258-q of the said Article 21-A (Exhibit C) and the said Official Orders adopted pursuant thereto, all milk dealers who, since April 10, 1933, have been engaged continuously in the purchasing and handling of milk not having a well advertised trade name in the City of New York are and will be authorized and permitted to sell fluid milk in bottles to stores in the said City and stores in the said City are and will be authorized and permitted to sell such milk to consumers at a price one cent per quart below the minimum price at which the plaintiff's fluid milk in bottles may be sold.

Twenty-second. Upon information and belief, the bottled milk of all dealers who have been classified as not having well advertised trade names has been sold by such dealers to stores in the City of New York and by stores in the said City to consumers at the lower price permitted by said Section 258-q and said Official Orders adopted pursuant thereto.

Twenty-third. Prior to the year 1932, less than one-third of the fluid milk sold to stores in the City of New York was sold in bottles. The remainder of the milk sold to [fol. 10] stores in the said City was in the form of "loose milk" which was sold in bulk and which was not sold under any trade name. On or about November 20, 1931, a commission appointed by the Department of Health of the City of New York to study the advisability of continuing to permit the sale of loose milk to stores for resale to consumers recommended that the sale of such milk be prohibited. Pursuant to such recommendation, the Board of Health of the said City thereafter made an order to become effective January 1, 1933, prohibiting the sale of loose milk to stores for resale to consumers. The effective date of such order was subsequently deferred until June 1, 1933.

Twenty-fourth. By reason of the empending ban upon the sale of loose milk to stores in the City of New York for resale to consumers, all dealers engaged in the business of selling fluid milk to stores in the said City were forced to make a drastic change in the methods of distribution theretofore employed by them. The transition from the sale of loose milk to the sale of bottled milk to stores in the said City commenced on or about April 1, 1932 and continued until the effective date of the ban on June 1, 1933. The competition which existed prior to April 1, 1932 for the business of selling fluid milk to stores in the said City was intensified by the efforts of all dealers to obtain a larger part of the newly created market for the sale of bottled milk. Such competition was marked by widespread price cutting and a steadily declining price level. The entire market was unsettled and wide variations in the prices [fol. 11] charged by all dealers for bottled milk sold to stores existed not only in different sections of the said City but also in the same sections.

Twenty-fifth. At no time prior to April 10, 1933, did there exist any trade custom, practice or usage whereby the bottled milk of dealers thereafter classified as not having well advertised trade names was sold to stores in the City of New York at a different price than the bottled milk of the plaintiff and of other dealers classified as having well advertised trade names.

Twenty-sixth. There are now, and for some time prior to April 10, 1933 there were, more than 150 dealers engaged

in the business of selling fluid milk in bottles to stores in the City of New York, with all of which said dealers the plaintiff has at all times been in direct and active competition.

Twenty-seventh. Upon information and belief, at no time subsequent to April 1, 1932 has there been any decrease in the number of dealers engaged in the business of selling fluid milk in bottles to stores in the City of New York. During said period there have been more than 25,000 stores in the said City engaged in the sale of bottled milk to consumers. The average amount of bottled milk sold by all dealers to such stores exceeds 1,000,000 quarts per day. Of such amount the dealers classified as having well advertised trade names, other than the plaintiff, sell approximately 7% and the plaintiff sells approximately 14%.

[fol. 12] Twenty-eighth. Under and by virtue of the said Article 25 (Exhibit A) and of the said Article 21 and Article 21-A (Exhibit C), the price paid by every milk dealer to the producer for the milk purchased by the dealer has at all times subsequent to May 16, 1933 been based solely upon the use to which such milk is eventually put, and has not been affected by the price obtained by the dealer upon the resale of such milk.

Twenty-ninth. At no time herein mentioned has the annual cost of the plaintiff's advertising exceeded one-fifth of one cent per quart of bottled milk sold.

Thirtieth. The bottled milk which dealers classified as not having well advertised trade names may sell to stores in the City of New York and stores in the said City may sell to consumers at a price one cent per quart below the price at which the bottled milk of the plaintiff and of other dealers classified as having well advertised trade names may be sold is required by law to adhere to the same standards of purity and wholesomeness. All bottled milk sold in the said City is required to have printed on the cap the name of the dealer distributing such milk.

Thirty-first. The services rendered by the plaintiff and by other dealers classified as having well advertised trade names in the sale of bottled milk to stores in the City of New York do not differ in any respect from the like services rendered by dealers classified as not having well advertised trade names.

[fol. 13] Thirty-second. The plaintiff and other dealers classified as having well advertised trade names have at all times herein mentioned engaged in the business of selling bottled milk to stores in the City of New York in all respects in the same manner and under similar conditions as dealers classified as not having well advertised trade names, with the sole exception of the statutory requirements herein complained of fixing different minimum prices at which sales of bottled milk to stores in the said City may be made.

Thirty-third. The Legislature of the State of New York has not at any time adopted any policy or enacted any measure looking toward the suppression or discouragement of the advertising of milk. Under and by virtue of Article 25-A of the Agriculture and Markets Law, enacted by Chapter 822 of the Laws of New York of 1934, a Bureau of Milk Publicity has been created by the Legislature with power to carry on an extensive advertising campaign for the purpose of increasing the consumption of milk.

Thirty-fourth. A serious decline in the price of milk commencing in the year 1931 resulted in producers receiving for their milk a price alleged by the producers to be less than the cost of production. To meet the emergency created by this situation the Legislature of the State of New York by a resolution adopted on March 10, 1932, appointed a joint committee known as the Pitcher Committee to investigate the milk industry. After a careful and detailed inquiry, the said Committee made a report of its findings to the Legislature and recommended the enactment [fol. 14] of a statute substantially similar to Chapter 158 of the Laws of 1933 (Exhibit A) except for the exclusion of any provision for a differential between the minimum prices to be charged for bottled milk sold to stores in the City of New York by dealers having well advertised trade names and by dealers not having such names. The report of the said Committee did not recommend or in any manner indicate the necessity or advisability of any such differential, nor did the proposed bill drafted by the said Committee make any provision therefor. The bill introduced in the Legislature likewise made no provision therefor.

Thirty-fifth. Prior to the expiration of said Chapter 158 of the Laws of 1933 (Exhibit A) the Milk Control Board created by such law for the purpose of administering the

provisions thereof made a report to the Legislature of the State of New York recommending the re-enactment of such law with certain changes and submitted a proposed bill for such purpose. The said Milk Control Board in its report did not recommend the continuance of the provisions of Subsection (c) of Section 317 of Article 25 (Exhibit A) providing for a differential between the minimum prices to be charged for bottled milk sold to stores in the City of New York by dealers having well advertised trade names and by dealers not having such names, nor did it include any similar provision in its said proposed bill. The bill introduced in the Legislature likewise contained no such provision.

Thirty-sixth. The said Article 21 and Article 21-A (Exhibit C) and the said Official Orders No. 12 (Exhibit B) and [fol. 15] No. 74 (Exhibit D), in so far as the said Articles and Official Orders (1) prohibit or restrain the plaintiff from selling to stores in the City of New York its fluid milk in bottles at a price as low as that at which any other person, firm, corporation or association is authorized or permitted to sell to stores in the said City fluid milk in bottles, or (2) prohibit or restrain stores in the said City from purchasing from the plaintiff its fluid milk in bottles at a price as low as that at which such stores are authorized or permitted to purchase fluid milk in bottles from any other person, firm, corporation or association, or (3) prohibit or restrain stores in the said City from selling to consumers the plaintiff's fluid milk in bottles at a price as low as that at which such stores are authorized or permitted to sell to consumers fluid milk in bottles of any other person, firm, corporation or association, are arbitrary, unreasonable, oppressive and discriminatory and have no relation to the protection of the public health or the public welfare or to any of the objects or purposes for which the said Article 21 and Article 21-A were enacted, and, as the plaintiff is informed by its counsel and believes and therefore alleges, the said Article 21 and Article 21-A and the said Official Orders are by reason thereof in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiff of its property without due process of law and in that they deny the plaintiff the equal protection of the laws.

[fol. 16] Thirty-seventh. In and by Section 257 of the said Article 21 (Exhibit C), it is provided that no milk dealer (said term being defined in Section 253 of the said Article to include any person who purchases or handles milk, other than a hotel or restaurant which sells only milk consumed on the premises where sold or a producer who delivers milk only to a milk dealer) shall buy or sell or distribute milk unless such dealer be licensed as provided in said Article 21. It is further provided in and by Section 258 of said Article 21 that every milk dealer shall file on or before April 30, 1934, an application for the license so required to be obtained upon a blank prepared under authority of the Commissioner of Agriculture and Markets. It is further provided in and by Section 258-c of said Article 21 that the said Commissioner may refuse to grant a license or may revoke a license already granted when he is satisfied of the existence of any of the reasons set forth in said Section 258-c. It is further provided in and by Section 258-e of said Article 21 that the said Commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration and, in addition to any other remedy under Article 3 of the said Agriculture and Markets Law or otherwise, may apply for relief by injunction.

Thirty-eighth. The defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets, requires as a [fol. 17] prerequisite to the granting of the license required to be obtained by the plaintiff as a milk dealer pursuant to the provisions of Section 258 of the said Article 21 (Exhibit C) that the plaintiff shall agree in writing to comply with and obey the provisions of said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner. Upon the refusal of the plaintiff to enter into such an agreement by reason of the provisions of Section 258-q of said Article 21 and the Official Orders adopted pursuant thereto, the said Commissioner refused to grant to the plaintiff the license required to be obtained by it. The plaintiff thereupon instituted this action and obtained on April 26, 1934 from the Honorable Francis G. Caffey, United States District Judge, a temporary restraining order enjoining the defendants from bringing or prosecuting, until the hearing and determination of the application of

the plaintiff for an interlocutory injunction herein, any action, suit or proceeding against the plaintiff or against any one purchasing milk from or selling milk to the plaintiff by reason of the plaintiff continuing, on and after May 1, 1934, its business as a milk dealer without having first obtained the said license. The plaintiff prays leave to refer to said order with the same force and effect as if herein set forth at length. The plaintiff is now operating without a license under the authority of said order.

[fol. 18] Thirty-ninth. In and by Sections 38, 39 and 40 of the said Agriculture and Markets Law (a full, true and correct copy of which Sections is annexed hereto and marked "Exhibit E" and made a part hereof), it is provided that every person, firm, corporation or association who shall, by himself or itself or through his or its agents, officers and employees, violate any of the provisions of said law or of any other law the enforcement of which is within the jurisdiction of the Department of Agriculture and Markets, or who shall fail to obey any order of the Commissioner of Agriculture and Markets, or who shall violate any rule of the said Department, shall be subject to certain money penalties in the said Sections more particularly set forth, and that in an action for the recovery of any such penalty or forfeiture for the violation of such law or of such rule an application may be made on the part of the people for an injunction to restrain the defendant, his agents and employees, from the further violation thereof.

Fortieth. In and by Section 41 of the said Agriculture and Markets Law (a full, true and correct copy of which Section is annexed hereto and marked "Exhibit F" and made a part hereof), it is provided that the violation of any of the provisions of the said Agriculture and Markets Law constitutes a misdemeanor, punishable by fine or imprisonment, or both.

[fol. 19] Forty-first. Under and by virtue of the said Article 21 and Article 21-A (Exhibit C) the defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets, and the defendant, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets are charged with the duty of en-

forcing the provisions of the said Article 21 and Article 21-A and the said Official Orders No. 12 (Exhibit B) and No. 74 (Exhibit D). The said defendants, in their said official capacities, have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles at a price less than the minimum price fixed in applicable orders promulgated from time to time by the said Commissioner, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to and do make sales of fluid milk in bottles at a price one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

Forty-second. Under and by virtue of the said Agriculture and Markets Law the defendant, John J. Bennett, Jr., as Attorney General of the State of New York, is charged with the duty of causing an action or proceeding to be brought in the name of the people for the recovery of any penalty or forefeiture incurred under the provisions of Sections 39 and 40 of said Law (Exhibit E). The said de-
[fol. 20] fendant, in his said official capacity, has threatened to cause an action or proceeding to be brought for the recovery of the penalties specified in said Sections 39 and 40 if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles at a price less than the minimum price fixed in applicable orders promulgated from time to time by the Commissioner of Agriculture and Markets, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to and do make sales of fluid milk in bottles at a price one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

Forty-third. Under and by virtue of the said Agriculture and Markets Law and other applicable statutes of the State of New York, the defendant, William C. Dodge, as District Attorney of the County of New York, is charged with the duty of prosecuting any person or corporation guilty of a violation of Section 41 of the said Agriculture and Markets Law (Exhibit F). The said defendant, in his said official capacity, may institute criminal proceed-

ings against the plaintiff, its officers, agents and employees, if the plaintiff shall sell or attempt to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles at a price less than the minimum price fixed in applicable orders promulgated from time to time by the Commissioner of Agriculture and Markets, although other persons, firms, corporations and associations which are competitors of the plaintiff are permitted to and do make sales of fluid milk in bottles at a [fol. 21] price one cent per quart less than the minimum so imposed upon the plaintiff by such orders.

Forty-fourth. Every store and other milk dealer purchasing milk from or selling milk to the plaintiff will be subject to the revocation of the license required to be obtained and held by such dealer, and every such dealer, and the officers, agents and employees thereof, will be liable to the penalties, fines and imprisonment hereinabove specified if the plaintiff shall sell or attempt to sell to stores in the City of New York or from its stores in the said City to consumers, or if such dealer shall sell or attempt to sell to consumers, the plaintiff's fluid milk in bottles at a price less than the minimum price fixed for such sales in applicable orders promulgated from time to time by the Commissioner of Agriculture and Markets, although the fluid milk in bottles of other persons, firms, corporations and associations is permitted to be sold at a price one cent per quart less than the minimum price so imposed for sales of the plaintiff's fluid milk in bottles, and the plaintiff will thereby be rendered unable to maintain and carry on its business.

Forty-fifth. The penalties attached to the violation of the said Article 21 and Article 21-A (Exhibit C) and the said Official Orders No. 12 (Exhibit B) and No. 74 (Exhibit D) are so great that (a) the plaintiff may not sell to stores in the City of New York its fluid milk in bottles at a price as low as that at which other persons, firms, cor- [fol. 22] porations and associations are and will be authorized and permitted to sell to stores in the said City fluid milk in bottles; and (b) stores in the said City may not purchase from the plaintiff the plaintiff's fluid milk in bottles at a price as low as that at which such stores are and will be authorized and permitted to purchase from other persons, firms, corporations and associations fluid

milk in bottles; and (c) stores in the said City may not sell to consumers the plaintiff's fluid milk in bottles at a price as low as that at which such stores are and will be authorized and permitted to sell to consumers fluid milk in bottles of other persons, firms, corporations and associations, even for the purpose of testing the constitutionality and validity of the said Articles and of the said Official Orders, and unless this court shall determine the validity of the said Articles and of the said Official Orders in this proceeding the plaintiff, its officers, agents and employees will be compelled to submit to the said Articles and the said Official Orders, whether the same be valid or invalid, and the plaintiff will thereby be deprived of its property without due process of law and will be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Forty-sixth. By reason of the said Articles and the said Official Orders the plaintiff's market for the sale of its fluid milk in bottles to stores in the City of New York is and will be impaired to the extent of not less than 25,000 quarts daily, and the plaintiff's market for the retail of its fluid milk in bottles directly to consumers in the said [fol. 23] City is and will be impaired to the extent of not less than 50,000 quarts daily. The plaintiff is now suffering, and will suffer each day that the said impairment continues, immediate and irreparable injury, loss and damage for which it has and can have no recourse.

Forty-seventh. The plaintiff has no adequate remedy at law and is relievable only in a court of equity.

Wherefore, and inasmuch as the plaintiff can have adequate relief only in a court of equity, the plaintiff prays:

1. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, John J. Bennett, Jr., as Attorney General, and William C. Dodge, as District Attorney of the County of New York, and each of them, from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or

indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents, or employees thereof, by reason of the plaintiff selling or attempting to sell to stores in the City of New York, or from its stores in the said City to consumers, its fluid milk in bottles at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at [fol. 24] which any other person, firm, corporation or association is or may be authorized or permitted to sell fluid milk in bottles to stores or from stores to consumers, as the case may be, in said City;

(b) Against any other person, firm, corporation or association in the City of New York or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of the said Agriculture and Markets Law to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm or corporation or association purchasing from the plaintiff, or selling to consumers in the said City, the plaintiff's fluid milk in bottles at a price less than the minimum price for such sales fixed or which may be fixed from time to time by the said Commissioner but not less than the lowest price at which such person, firm, corporation or association is or may be authorized or permitted to purchase or to sell to consumers, as the case may be, the fluid milk of any other person, firm, corporation or association in bottles in said City.

2. That the said Article 21 and Article 21-A and the said Official Orders in so far as the said Articles and Official Orders (1) prohibit or restrain the plaintiff from selling to stores in the City of New York its fluid milk in bottles [fol. 25] at a price as low as that at which any other person, firm, corporation or association is authorized and permitted to sell to stores in the said City fluid milk in bottles, or (2) prohibit or restrain stores in the said City from purchasing from the plaintiff its fluid milk in bottles at a price as low as that at which such stores are authorized and permitted to purchase fluid milk in bottles from any other person, firm, corporation or association, or (3) pro-

hibit or restrain stores in the said City and the retail stores operated by the plaintiff in the said City from selling to consumers the plaintiff's fluid milk in bottles at a price as low as that at which such stores are authorized and permitted to sell to consumers fluid milk in bottles of any other person, firm, corporation or association, be declared to be unconstitutional, illegal and void in that they violate the Fourteenth Amendment to the Constitution of the United States by depriving plaintiff of its property without due process of law and by denying plaintiff the equal protection of the laws, and that an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the enforcement of the said Articles and Official Orders as hereinabove prayed for.

3. That the plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with equity.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff. Walter E. Hope, of Counsel.

[fol. 26] *Duly sworn to by Wm. H. Marcussen. Jurat omitted in printing.*

[fol. 27] EXHIBIT "A" TO COMPLAINT

Chapter 158

An Act to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties.

Became a law April 10, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-five of chapter forty-eight of the laws of nineteen hundred twenty-two, re-entitled by chapter two hundred and seven of the laws of nineteen hundred twenty-seven, "An act in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated

laws," comprising sections two hundred and ninety-two to two hundred and ninety-seven, both inclusive, is hereby renumbered article twenty-six, and such sections are hereby renumbered sections three hundred and fifty to three hundred and fifty-five, respectively, and such chapter is hereby amended by adding a new article, to be article twenty-five, to read as follows:

Article 25

Milk Control

Section 300. Legislative finding; statement of policy.
301. Definitions.
302. Milk control board.
303. General powers.
304. Rules and orders.
305. Investigation.*
306. Entry and inspection.

[fol. 28]

Section 307. Violations; remedies.
308. Licenses to milk dealers; suspension; revocation; review.
309. Records.
310. Reports.
311. Report of receipts.
312. Order fixing price of milk.
313. Legislative intent.
314. Interstate and federal compacts.
315. Reports to governor and legislature.
316. Partial invalidity.
317. Construction, exceptions and limitations.
318. Saving clause.
319. Duration of board.

§ 300. Legislative finding; statement of policy.—This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk

* So in original. [Does not conform to section heading.]

products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for in- [fol. 29] dustrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

§ 301. Definitions.—As used in this article, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Commissioner" means the commissioner of agriculture and markets.

"Board" means the temporary state agency created by this article, to be known as the "Milk control board."

"Director" means the director of the milk control board.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article,

and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A pro- [fol. 30] ducer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and surrounding territory designated by the board as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk within the state of New York.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 302. Milk control board.—There shall be in the department of agriculture and markets a milk control board, to consist of the comissioner of agriculture and markets, the commissioner of health, and the director of the milk control board. The commissioner of agriculture and markets and the commissioner of health shall receive no additional compensation for services rendered pursuant to this article, but shall be allowed their actual and necessary expenses incurred in the performance of their duties under this article. The director shall be appointed by the governor and serve during his pleasure. The director shall receive a compensation to be fixed by the governor within the amount [fol. 31] available by appropriation. Technical, legal and other services for such board shall be performed, so far as practicable, by forces or officers in the department of agriculture and markets and by forces or officers in the department of health, without additional compensation, but the commissioner may appoint and at pleasure remove such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this article, prescribe their powers and duties, and fix their compensation within the amount available by appropriation.

The director and the additional technical, legal and other assistants and employees appointed by the board, shall be exempt from civil service examination and the provisions of the civil service law and rules. The commissioner of agriculture and markets shall be the administrative head of the board. Each member of the board shall execute and file with the comptroller a bond conditioned for the safe keeping and lawful application of moneys coming to the board and under his control in such amount as may be approved by the head of the department of taxation and finance. The commissioner shall, subject to the limitations of this article and of law, enforce the provisions of this article, but no official act shall be taken, rule or regulation promulgated, or official order made or enforced, with respect to the provisions of this article, without the approval of a majority of the members of the board. The commissioner of agriculture and markets may by official order filed in the office of the department of agriculture and markets designate a deputy, assistant or other subordinate in the department of agriculture and markets, to perform the duties of the commissioner, and the commissioner of health by official order filed in the office of the department of [fol. 32] health may designate a deputy, assistant or other subordinate in the department of health to perform the duties of the commissioner of health under this article. The person, if any designated pursuant to this section, shall have the powers and be subject to the duties and responsibilities of the officer appointing him. Such designation shall be deemed temporary only and shall not affect the civil service or retirement rights of the person designated. The persons so designated shall not receive any additional compensation for the services performed, but shall be allowed their actual and necessary traveling and other expenses incurred in the performance of their duties under this article. The principal office of the board shall be in the city of Albany, in rooms assigned by the superintendent of public buildings, but offices in other localities may be maintained by the board.

§ 303. General powers.—The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement of policy and application of article, and is hereby vested with power.

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public service law, the state sanitary code or any local health ordinance or regulation.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage, transportation, disposal, [fol. 33] distribution and sale of milk and milk products in the state of New York. The board shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom such information may be desired to carry out the purpose and intent of this article and may issue commissions to take depositions of witnesses absent from the state. Any member of the board or designated employee may sign and issue subpoenas and may administer oaths to witnesses. The provisions of the civil practice act in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpoena issued by the board as authorized in this section.

(c) The board may act as mediator and arbitrator in any controversy or issue that may arise among or between milk producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power upon the board shall not be impaired or qualified by the granting to the board by this article of a specfiic power or powers.

§ 304. Rules and orders.—The board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order of the board shall be posted for public inspection in the main office of the board and a certified copy filed in the office of the department of state. An order applying only to a person or persons named therein shall be served on the person or

persons affected. An order herein required to be served shall be served by personal delivery of a certified copy, or by [fol. 34] mailing a certified copy in a sealed envelope with postage prepaid to each person affected thereby, or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the main office of the board of any rule, and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule of the board when duly posted and filed as provided in this section shall have the force and effect of law. The provisions of this section as to service of orders shall not apply to orders fixing prices of milk as to which provision is made in section three hundred twelve of this article.

§ 305 Investigations.—The practice and procedure under this article with respect to any investigation by the board authorized by this article, except as otherwise expressly provided by this article, shall be in accordance with the provisions of article three of this chapter and all of the provisions of such article not inconsistent with the provisions of this article shall apply to such investigation.

§ 306. Entry and inspection.—Any member of the board or employee designated for the purpose, shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured into food products. Any member of the board or designated employee also shall have power to inspect all books, papers, records or documents in any place within the state for the purpose of ascertaining facts to enable the board to administer this article.

[fol. 35] § 307. Violations; remedies.—A violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding one year, or both, and each day during which such violation shall continue shall be deemed a separate violation. The board may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this article or to enforce compliance with any rule or order of the board made pursuant

to the provisions of this article, and in addition to any other remedy may apply to the supreme court in the third judicial district, for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.

§ 308. Licenses to milk dealers; suspension; revocation; review.—1. No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section, and it shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or, in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this article. The board may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk [fol. 36] dealers selling milk in any quantity in markets of one thousand population or less. The board may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

2. An application for a license to operate as a milk dealer shall be made within thirty days after this article takes effect for the license period commencing May first, nineteen hundred thirty-three and ending March thirty-first following, by mail or otherwise, to the board upon blanks prepared under authority of the board. The applicant shall state the nature of the business to be conducted, the full name of the person applying for the license, and if the applicant be a firm or association, the full name of each member, and if a corporation the names and addresses of all officers and directors, and the city, town or village and the street number, if any, at which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to properly conduct the business of receiving and handling milk; that he has complied with all rules and orders of the board filed or served as required in this article, and such other facts with respect to the license as may be required by the board pursuant to this article. Such application

shall be accompanied by the license fee required to be paid by this section. A license shall be granted to the applicant by the board, subject to the provisions of this article.

3. The board may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant or licensee, when satisfied of the existence of any of the following:

[fol. 37] (a) That a milk dealer has rejected, without reasonable cause, any milk purchased from a producer or has rejected without reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased from a producer.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the board of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A co-operative asso-[fol. 38] ciation of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales

or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monoply * nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where the milk dealer has continued in a course of dealing of such nature as to satisfy the board of an intent to deceive or defraud producers or consumers.

(h) Where there has been a failure either to keep records or to furnish the statements or information required by the board.

(i) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(j) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the licensee has violated any of the provisions of this article.

[fol. 39] 4. A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued, a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of twenty-five dolars; a milk dealer receiving a daily average total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two

* So in original [Word misspelled.]

hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of mik of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the board may fix, pay an additional sum based upon the daily average total quantity of milk received by such dealers during the license period as fixed by this article. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of cream, and/or condensed or concentrated milk, except when sold in hermetically sealed cans, shall be included in such [fol. 40] determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

5. The board may classify licenses and may issue licenses to milk dealers to store, manufacture or sell milk limited to a particular city or village or to a particular market or markets in the state.

6. The official order of the board, in refusing to issue a license, or in suspending or revoking a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 309. Records.—The board may require licensees to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

[fol. 41] (g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the board may deem necessary for the proper enforcement of this article.

§ 310. Reports.—Each licensee shall, from time to time, as required by rule or order of the board, make and file a verified report on forms prescribed by the board of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this article. Such report shall cover a period of time specified in the order.

§ 311. Report of receipts.—On or before the tenth day of each month, the board shall pay over to the department of taxation and finance, division of finance, all receipts of the board on account of license fees and other moneys received by the board during the preceding month. Such moneys shall be paid into the state treasury, to the credit of the general fund. On or before the tenth day of each month the board shall make a verified and detailed report to the department of taxation and finance of all receipts of the board for the preceding month.

§ 312. Order fixing price of milk.—(a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health

[fol. 42] and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from pro- [fol. 43] ducers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular [fol. 44] transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the

public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state be- [fol. 45] comes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 313. Legislative intent.—It is the intent of the legislature that no provisions of this Article shall prevent, and no provision contained therein shall be deemed or construed to prevent a cooperative corporation, organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the cooperative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such cooperative

[fol. 46] corporation upon such basis. Also that no provision of this article shall be deemed or construed to affect the contracts of such a co-operative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of such chapter or any of its operations thereunder, except as in this article otherwise provided.

§ 314. Interstate and federal compacts.—The board is hereby vested with authority to confer with legally constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law.

§ 315. Reports to governor and legislature.—The board shall, when requested, make reports of its proceedings to the governor and to the chairman of the finance committee of the senate and the chairman of the ways and means committee of the assembly.

§ 316. Partial invalidity.—If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 317. Construction, exceptions and limitations.—(a) The licenses required by this article shall be in addition to any [fol. 47] other license required by this chapter or otherwise required by law, and this article shall apply to the city of New York, but shall not be construed to conflict, alter or repeal laws now in force relating to the board or department of health of the city of New York, nor the sanitary code now in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health of the department of

health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city.

(b) This article shall not apply to certified milk, nor to milk sold to the state or any municipality or to the federal government upon bids.

(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.

§ 318. Saving clause.—No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective [fol. 48] pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto.

§ 319. Duration of board.—The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate. All books, papers, records and documents in the possession of the board when terminated shall be delivered to the department of agriculture and markets.

§ 2. This act shall take effect immediately.

[fol. 49] EXHIBIT "B." TO COMPLAINT

State of New York

Department of Agriculture & Markets

Milk Control Board

Official Order. No. 12

In the Matter of Determining "Well Advertised Trade Name" under the Provisions of Chapter 158 of the Laws of 1933, Section 317, Sub-Section C

It is hereby ordered and determined that the phrase "well advertised trade name" in the Sub-Section above referred to refers to the following:

Borden's Farm Products Co., Inc.
"Borden."
Sheffield Farms Co., Inc.
"Sealect."
Dairymen's League Co.
"Dairylea."
M. H. Renken Dairy Co.
"Renken."

This order shall be effective immediately and until further notice.

Dated Albany, N. Y., May 5, 1933.

Milk Control Board. Charles H. Baldwin. Thomas Parran, Jr. Kenneth F. Fee.

[fol. 50] EXHIBIT "C" TO COMPLAINT

State of New York

An act to amend the agriculture and markets law, in relation to creating a division of milk control, defining its jurisdiction, powers and duties, and continuing certain special powers and duties during the existing emergency, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-one of chapter forty-eight of the laws of nineteen hundred twenty-two, entitled "An act

in relation to agriculture and markets, constituting chapter sixty-nine of the consolidated laws," the title of such chapter having been thus amended by chapter two hundred seven of the laws of nineteen hundred twenty-seven, as amended, is hereby repealed, and a new article twenty-one added in place thereof to read as follows:

Article 21

Milk Control

Section 252. Division of milk control.
253. Definitions.
254. General powers.
255. Rules and orders.
256. Entry, inspection and investigation.
257. Licenses to milk dealers.
258. Application for license.
258-a. License fees.
258-b. Bonds and enforcement.
258-c. Granting and revoking licenses.
258-d. Certiorari to review.
258-e. Violations; remedies.
258-f. Records.
258-g. Reports.
258-h. Bond of director and financial officer.
258-i. Disposition of license fees.
258-j. Construction, exceptions and limitations.

Explanation—Matter underscored is new; matter in [ ] is old law to be omitted.

[fol. 51] § 252. Division of milk control.—There shall be in the department a division to be known as the division of milk control. The head of the division shall be a director, who shall be appointed by the commissioner and serve during his pleasure. The functions, powers and duties of the department, as provided by this article, and by article four of this chapter, shall be exercised and performed therein by and through the division of milk control. The functions, powers and duties of the milk control board created by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three, except as modified by this article and by article twenty-one-a of this chapter, shall be exercised and performed in the department by and through the division of milk control.

§ 253. Definitions.—As used in this article unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

"Division" means the division of milk control created by this article.

"Director" means the director of the division of milk control.

"Person" means any person, firm, corporation or association.

"Milk dealer" means any person who purchases or handles or sells milk. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary and affiliate of such corporation similarly engaged, shall be deemed a milk dealer within the meaning of this definition. A hotel or restaurant which sells only milk consumed on the premises where sold, or a producer who delivers milk or to a milk dealer, shall not be deemed a milk dealer.

[fol. 52] "Market" means any city, town or village, or two or more cities and/or towns and/or villages and surrounding territory designated by the commissioner as a natural marketing area.

"Licensee" means a licensed milk dealer.

"Milk" means liquid milk and/or cream fresh, sour or storage; and/or condensed or concentrated whole milk, except when contained in hermetically sealed cans. In each instance where quantity is referred to the intent is to include its whole milk equivalent.

"Producer" means a person producing milk.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

§ 254. General powers.—The department through the commissioner is hereby vested with the powers heretofore conferred upon the milk control board by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three, and also with the powers heretofore conferred with respect to milk gathering stations, manufactories and plants, including the following:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transporta-

tion, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York; provided, however, that nothing contained in this article shall be construed to abrogate or affect the status, force or operation of any provision of the public health law, the public [fol. 53] service law, the state sanitary code or any local health ordinance or regulation.

(b) To investigate all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the state of New York. The commissioner shall have the power to subpœna milk dealers, their records, books and accounts, and any other person from whom information may be desired to carry out the purpose and intent of this chapter and may issue commissions to take depositions of witnesses absent from the state. Any designated employee may sign and issue subpœnas and may administer oaths to witnesses and conduct hearings and investigations. The provisions of the civil practice act in relation to enforcing obedience to a subpœna lawfully issued by a judge, arbitrator, referee, or other person, or a board or committee, in a matter not arising in an action in a court of record shall apply to a subpœna issued as authorized in this section.

(c) The commissioner may act as mediator and arbitrator in any controversy or issue that may arise among or between producers and milk dealers as between themselves or that may arise between them as groups.

(d) The operation and effect of any provision of this article conferring a general power shall not be impaired or qualified by the granting by this article of a specific power or powers.

§ 255. Rules and orders.—The commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of this article. Every rule or order shall be posted for public inspection in the main office of the division and a copy filed in the office of the department of state, [fol. 54] except an order directed only to a person or persons named therein which shall be served by person delivery of a copy, or by mailing a copy in a sealed envelope with postage prepaid to each person to whom such order is directed, or, in the case of a corporation, to any officer or

agent of the corporation upon whom a summons may be served in accordance with the provisions of the civil practice act. The posting in the main office of the division of any rule and of any order not herein required to be served, and such filing in the office of the department of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule when duly posted and filed as provided in this section shall have the force and effect of law.

§ 256. Entry, inspection and investigation.—Any employee designated for the purpose shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the state, and may administer oaths and take testimony for the purpose of ascertaining facts which in the judgment of the commissioner are necessary to administer this chapter.

§ 257. Licenses to milk dealers.—No milk dealer shall buy milk from producers or others or sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe [fol. 55] has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. The commissioner may by official order exempt stores from the license requirements provided by this article where no milk is delivered therefrom to consumers by vehicle.

§ 258. Application for license.—An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be con-

ducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty-first following. An application must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

[fol. 56] § 258-a. License fees.—A milk dealer receiving during any of the twelve calendar months immediately preceding the period for which the license is issued, a daily average total quantity of milk not exceeding four thousand pounds, shall pay a license fee of twenty-five dollars; a milk dealer receiving a daily average total quantity of milk of more than four thousand pounds and not exceeding twenty thousand pounds, shall pay a license fee of seventy-five dollars; a milk dealer receiving a daily average total quantity of milk of more than twenty thousand pounds and not exceeding one hundred thousand pounds, shall pay a license fee of two hundred and fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than one hundred thousand pounds, and not exceeding five hundred thousand pounds, shall pay a license fee of seven hundred fifty dollars; a milk dealer receiving a daily average total quantity of milk of more than five hundred thousand pounds, and not exceeding one million pounds, shall pay a license fee of twenty-five hundred dollars; a milk dealer receiving a daily average total quantity of milk of more than one million pounds, shall pay a license fee of five thousand dollars. Milk dealers who have not previously engaged in such business during such prior year shall pay such minimum license fee and in addition thereto, at such time or times as the commissioner may fix, they and all other dealers shall pay an additional sum based upon the

daily average total quantity of milk received by such dealers during any month of the license period. It is not the intent that milk utilized or sold in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of condensed or concentrated milk, except when sold in her- [fol. 57] metically sealed cans, and/or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee. The commissioner may, by rule or order, provide for licensing, at any rate of license fee less than the rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements. A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

258-b. Bonds and enforcement.—Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

Upon default by the licensee in any conditions of the bond, if there is reason to believe that the licensee owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall examine [fol. 58] claims so filed and by certificate determine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as

finally determined, then it shall be divided pro rata among them.

A licensee shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk to such licensee by the bond does not adequately protect such producers, the commissioner may require such licensee to give an additional bond in the sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer, whenever, in the judgment of the commissioner, protection by bond or otherwise is necessary or desirable to protect the interests of producers.

If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial con- [fol. 59] dition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company, or bonds of the United States or state of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

Bonds for the license year commencing April first, nineteen hundred thirty-five and for subsequent license years shall be filed with the applications. A milk dealer who has filed with the commissioner a bond for the license period ending August thirty-first, nineteen hundred thirty-four, which in the opinion of the commissioner affords ample pro-

tection shall not be required to file a bond with his application for a license for the license year ending March thirty-first, nineteen hundred thirty-five, but such a dealer shall file not later than August first, nineteen hundred thirty-four, a bond as required by this section, which shall be effective from September first, nineteen hundred thirty-four, to March thirty-first nineteen hundred thirty-five, both inclusive.

§ 258-c. Granting and revoking licenses.—No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless [fol. 60] the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been re- [fol. 61] turned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injuries to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(h) Where it is shown that any statement upon which the license was issued is or was false or misleading in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or corporation [fol. 62] and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pur-

suant to the provisions of this article or of the similar laws which preceded it.

(k) Where the licensee has violated any of the provisions of this article or of the similar laws which preceded it.

(l) Where the licensee has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally upon the agreement of the licensee or applicant to do or omit to do any designated act, but such condition must have some appropriate relation to the administration of this article or of article twenty-one of this chapter.

§ 258-d. Certiorari to review.—The action of the commissioner in refusing to grant or renew a license, or in revoking or suspending a license, or in conditioning or limiting the granting or renewal of a license, may be reviewed by certiorari in the manner provided by the civil practice act.

§ 258-e. Violations; remedies.—The commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration, and in addition to any other remedy under article three of this chapter or otherwise may apply for relief by injunction if necessary to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Such application may be [fol. 63] made to the supreme court in any district or county as provided in the civil practice act and the rules of practice of the court, or to the supreme court in the third judicial district.

§ 258-f. Records.—The commissioner may require licencees to keep the following records;

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the commissioner may deem necessary for the proper enforcement of this article.

§ 258-g. Reports.—Each licensee shall, from time to time, as required by rule or order of the commissioner, make and file a verified report on forms prescribed by the [fol. 64] commissioner of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this chapter. Such report shall cover a period of time specified in the order.

§ 258-h. Bond of director and financial officer.—The director and any officer of the division authorized to accept or receive moneys paid or to be paid to the division as provided by this chapter, shall, before he enters upon the discharge of his duties, execute and file a bond in such amount as may be fixed by the head of the department of taxation and finance in the manner provided by the public officers law.

§ 258-i. Disposition of license fees.—The commissioner shall deposit to his credit all license fees and other moneys collected by the division under this chapter in a responsible bank, banking house or trust company in the city of Albany which shall pay the highest rate of interest for such deposit. On or before the tenth day of each

month the commissioner shall pay over to the department of taxation and finance, division of finance, all license fees received by the division from those to whom licenses were issued during the preceding month and all other moneys received by the division during the preceding month. Such money shall be paid into the state treasury to the credit of the general fund. On or before the tenth day of each month the commissioner shall make a verified and detailed report to the department of taxation and finance of all receipts of the division for the preceding month.

§ 258-j. Construction, exceptions and limitations.—The license required by this article shall be in addition to any other license required by this chapter or otherwise re- [fol. 65] quired by law. This article shall apply to the city of New York, but shall not be construed to conflict with, alter or repeal laws in force relating to the board or department of health of the city of New York, nor the sanitary code in force in such city or any amendments thereof duly adopted, nor shall any provision of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health o* the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city. If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. The transfer by this article to the division of milk control of powers, duties and functions heretofore vested in the milk control board or the commissioner shall be deemed to constitute a continuation thereof and not a new authority, for the purpose of succession to all rights,

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* Appeared this way in original.

powers, duties and obligations, and neither such transfer nor the limitation of the period originally designated for duration of the board shall affect any action or proceeding pending at the time of such transfer, and the right to commence an action or proceeding by reason of acts done or [fol. 66] rights accrued before such transfer. Technical legal and other assistants and employees in the service of the milk control board at the time such transfer takes place shall be transferred to the division, subject to qualifying examinations to be conducted by the civil service commission as soon as convenient after transfer, and in the meantime they shall serve without examination. The civil service commission shall designate, upon advice of the commissioner the positions which it is not practicable to fill by competitive examination, including the director, assistant director, counsel and assistant counsel. The rules and orders of the milk control board in effect at the time of the transfer shall remain in full force and effect until otherwise provided by the commissioner.

§ 2. Such chapter is hereby amended by adding a new article, to be article twenty-one-a, to read as follows:

Article 21-A

Emergency Milk Control

Section 258-k. Legislative declaration.
258-l. Division; definitions; milk advisory committee.
258-m. Orders fixing prices and handling charges for milk.
258-n. Co-operative corporations.
258-o. Equalization of prices to producers.
258-p. Interstate and federal compacts.
258-q. Construction, exceptions and limitations.
258-r. Application of article; emergency period.

§ 258-k. Legislative declaration.—The legislature having declared by chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three that certain conditions exist relative to the production, sale and distribution of milk and milk products in this state, endangering the public health and public welfare and amounting to a public [fol. 67] emergency in the milk industry of the state, it is

hereby declared that such emergency still exists and may reasonably be expected to continue until April first, nineteen hundred thirty-five.

§ 258-1. Division; definitions; milk advisory committee. —1. The functions, powers and duties provided by this article shall be exercised and performed by and through the division of milk control created by article twenty-one of this chapter, and the definitions used in such article shall be applicable to this article also except as the context otherwise indicates.

2. There shall be in the division a milk advisory committee, which shall consist of not less than eleven nor more than fifteen members. The commissioner shall appoint the members of the committee, to serve until March thirty-first, nineteen hundred thirty-five, as follows: At least one member and not more than two members from a list of not less than five persons nominated by each of the following organizations: Dairymen's League Co-operative Association, Inc.; Sheffield Producers Co-operative Association, Inc.; Greater New York-New Jersey Milk Institute, Inc.; Brooklyn and Queens Milk Dealers Association of New York City; and New York State Milk Distributors, Inc. The commissioner shall provide for the time when such nominations shall be filed, and make any other provision which he deems necessary or advisable with respect to the making or filing of such nominations or filling a vacancy in such committee. The president of the New York state agricultural society shall be a member of the committee. The commissioner shall appoint some other person as a member of such committee to represent the interests of producers not members of either of the two producers' co- [fol. 68] operative associations specified. The commissioner shall appoint the remaining members of the committee in such number, within the limits above specified, from such persons as in his judgment shall best bring about such representation on the committee as a whole as will best protect the public interest. The commissioner shall confer with the committee relative to the making, altering, revising or amending of any official order under provisions of section two hundred fifty-eight-m, and shall make no order under provisions of section two hundred fifty-eight-o

without the affirmative vote of a majority of the committee. The commissioner shall call a meeting of and confer with the committee when requested so to do by a majority of the members of such committee with respect to making, altering, revising or amending of any official order under provisions of section two hundred fifty-eight-m and/or section two hundred fifty-eight-o. The members of the committee shall receive no compensation for their services, but shall be paid and receive traveling and other expenses incurred in performance of their duties.

§ 258-m. Orders fixing prices and handling charges for milk.—The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance be- [fol. 69] tween production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

1. The commissioner, after making such investigations, may fix, by official order:

(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses. The order of the commissioner with respect to the minimum prices to be paid to producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which milk so produced is sold, and may vary in different localities or zones or markets according to varying uses and differing conditions.

When, in the judgment of the commissioner, it is necessary or advisable, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser price for milk which is produced in excess of what is needed for fluid consumption, he may establish a quantity or quota applicable to each producer, or to certain classes of producers, or to producers producing for a certain market or markets but no such quota shall be established until pursuant to federal or state statutes, or by action of au-

thorities duly constituted and authorized thereunder, quotas are established and made effective throughout all the states comprising the New York milk shed, as that term is commonly understood in the milk industry. For that purpose the commissioner may require any milk dealer to supply necessary information about the quantities of milk received from producers during a specified period of time, and to determine a quota or quantity for each such producer in accordance with rules to be adopted by the commissioner, and subject to review and approval by him. [fol. 70] The commissioner may determine the prices to be received by producers for milk within the quota and for milk in excess of it.

Each order fixing prices or handling charges may classify milk by forms, classes, grades or uses as the commissioner may deem advisable and may specify the minimum prices therefor.

It is declared to be the legislative intent that producers of milk in this state who sell their milk to milk dealers for shipment into or sale in another state where prices to producers are regulated by a state board or other authority, with powers substantially similar to those conferred by this article, shall receive the prices required to be paid for milk purchased from producers in such other states under similar conditions, for similar purposes and with proper allowance for transportation. It shall be unlawful for any milk dealer, except in any case where the commissioner shall otherwise determine, to pay a producer for milk to be sold in such other state a price lower than that required to be paid for milk purchased from producers in such other state under similar conditions and for similar purposes.

(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, [fol. 71] including a reasonable return upon necessary in-

vestment. The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary.

(c) The amount of handling and/or processing charges to be included in the price charged or paid by milk dealers for milk involved in transactions between dealers. Such charges shall be classified according to the services performed or paid for by the dealer who sells the milk.

2. After the commissioner shall have fixed prices and/or handling charges to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

3. The commissioner may upon his own motion or upon application from time to time, alter, revise or amend an official order theretofore made with respect to the prices and/or handling charges to be charged or paid for milk. [fol. 72] Before making revising or amending any order fixing the prices and/or handling charges to be charged or paid for milk, the commissioner shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the commissioner shall afford sufficient notice and publicity. Such order of the commissioner may be reviewed by certiorari at the instance of any aggrieved person appearing of

record at the hearing either in person or by personal represenative and opposing the making of the order.

4. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

§ 258-n. Co-operative corporations.—It is the intent of the legislature that no provision of this article shall prevent, and no provision contained therein shall be deemed or construed to prevent a co-operative corporation, organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the pro- [fol. 73] ducers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price, with such deductions and/or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members and/or other producers represented by it, at a blended price based upon sales thereof in the various classes, and whether in fluid form or as manufactured products, both within and without the state, and which price is to be paid either directly to the producers or to the co-operative corporation. Nothing herein contained shall prevent any milk dealer from contracting for his milk with such co-operative corporation in such manner, but all such contracts shall be upon the basis of the prices and handling charges fixed by the commissioner, with the result that the net price received for milk by the co-operative cooperation shall be commensurate with such prices and handling charges; and further

provided that no milk dealer shall receive from a co-operative corporation directly or indirectly any discounts, rebates or compensation through rentals or otherwise for the purpose or with the effect of reducing the net cost to the dealer for milk purchased by or through a co-operative corporation. Also that no provision of this article shall be deemed or construed to affect the contracts of such a co-operative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of chapter seventy-seven of the consolidated laws or any of its operations thereunder, except as in this article otherwise provided.

[fol. 74] § 258-o. Equalization of prices to producers.—1. It is hereby declared to be the legislative intent that in so far as lawful and practicable all producers shall receive the same price for milk subject only to reasonable differences for quality and location, and for production in accordance with quotas as provided in section two hundred fifty-eight-m of this article, and subject to gains or losses, deductions or extra payments reflected in blended prices paid by a co-operative corporation to its producers as provided in section two hundred fifty-eight-n of this article.

2. In order to effect such equalization of prices to producers, the commissioner may determine as soon as practicable after the end of each month, from reports submitted by milk dealers, an equalized base price for milk sold by producer during that month, and the adjustments to be made for quality and location and for production in accordance with quotas. Such equalized base prices and adjustments may be determined for all milk sold by producers or may be determined separately for milk sold by producers in any locality or zone or market as determined by the commissioner. The commissioner may, by official order, require milk dealers who purchase milk from producers in the locality or zone or market affected thereby to pay for such milk in accordance with such equalized base prices and adjustments.

3. After an official order has been issued, requiring milk dealers to pay producers in accordance with an equalized base price, the commissioner shall maintain for each milk dealer affected by such order an adjustment account which shall be:

(a) Debited with the value of milk purchased by such milk dealer during the calendar month, computed on the [fol. 75] basis of minimum prices fixed pursuant to this article.

(b) Credited with the value of milk purchased by such milk dealer during the calendar month, computed on the basis of the equalized base price and adjustments fixed pursuant to this article.

4. The commissioner may, by official order, fix the time and manner of settlement of balances on adjustment accounts and each milk dealer shall pay to or receive from the fiscal agent, as the case may be, the amount of such balance as so fixed. The commissioner may require that any milk dealer or milk dealers give a surety bond or other security conditioned to secure prompt payment to the fiscal agent, and the giving of such bond or security shall be subject to the provisions of article twenty-one of this chapter. The commissioner may designate one or more trust companies to act as fiscal agents for handling such balances, and fix their compensation therefor. Payments made to the fiscal agents on account of such balances shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds. Whenever there is a balance on hand from any source in excess of any adjustments to be made to milk dealers, the commissioner may, by official order, provide for distribution of such balance or any part thereof in an equitable manner to the producers concerned.

The provisions of this section shall not become operative, however, until pursuant to federal or state statutes, or by action of authorities duly constituted and authorized thereunder, prices to producers are so equalized and made ef- [fol. 76] fective throughout all the states comprising the New York milk shed, as that term is commonly understood in the milk industry.

§ 258-p. Interstate and federal compacts.—The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control within the states and/or as between states, and may exercise his powers hereunder to effect such uniform milk control.

§ 258-q. Construction, exceptions and limitations.—This article shall apply to the city of New York, but shall not be construed to conflict with, alter or repeal laws in force relating to the board or department of health of the city of New York, nor the sanitary code in force in such city or any amendments thereof duly adopted, nor shall any provisions of this article or any regulations adopted thereunder, relating to matters of health, sanitation or purity or wholesomeness of milk which is in conflict with the sanitary code or the regulations of the board of health or the department of health of the city of New York, apply to the city of New York or to the production and transportation of milk for said city. If any clause, sentence, paragraph or part of this article shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this article shall apply or be construed to apply to foreign or interstate commerce except insofar as [fol. 77] the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. This article shall not apply to milk sold to the federal government nor shall it prevent the buying of milk by the state or any municipality upon bids. It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city.

§ 258-r. Application of article; emergency period.—The provisions of this article shall apply during the emergency period as defined by this section. "Emergency period" means the period between the time this article takes effect and April first, nineteen hundred thirty-five. Any action

or proceeding pending on April first, nineteen hundred thirty-five, and any right of action or cause of prosecution then accrued or existent arising out of this article or any violation of it may be prosecuted to final determination, and for such purposes the provisions of this article shall be deemed to be in full force and effect.

[fol. 78] § 3. The sum of two hundred and fifty thousand dollars ($250,000), or so much thereof as may be necessary, is hereby appropriated to the department of agriculture and markets from any moneys in the state treasury not otherwise appropriated to pay the expenses of the department in carrying out the provisions of articles twenty-one and twenty-one-a of the agriculture and markets law, as added by this act, payable on the audit and warrant of the comptroller in the manner provided by law. The moneys hereby appropriated shall be in addition to any other moneys appropriated to the department of agriculture and markets.

§ 4. This act shall take effect April first, nineteen hundred thirty-four.

[fol. 79] EXHIBIT "D" TO COMPLAINT

State of New York

Department of Agriculture and Markets

Division of Milk Control

Official Order No. 74

In the Matter of the Fixing of the Minimum Prices of Milk in the Metropolitan Area

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after notice which in the judgment of the Commissioner is sufficient; and the Commissioner having conferred with the Milk Advisory Committee and due deliberation having been had, it is hereby Ordered That Until Further Notice

1. Official Orders No. 27, 33, 35, 52 and 59 heretofore promulgated by the Milk Control Board and Official Order No. 65 heretofore promulgated by the Commissioner are hereby superseded by this order.

2. The territory covered by this order is the City of New York, and the counties of Westchester, Rockland, Nassau and Suffolk.

3. All of the provisions of this order shall apply to sales within the territory by any person whomsoever of milk or cream for fluid consumption, except as a separate or different provision may be made by this order or any subsequent order of the Commissioner.

4. The following are the minimum prices which shall be charged in the territory covered by this order:

	By milk dealers to consumers	By milk dealers to stores and restaurants	By stores to consumers
Grade "A" milk:			
Quart bottles	$.16	$.13¾	$.15
Pint bottles	.10	.08	.09
Half-pint bottles	...	.04¾	...
[fol. 80]			
Grade "B" milk:			
Quart bottles	$.13	$.10¾	$.12
Pint bottles	.08	.06	.07
Half-pint bottles	...	.03¾	...
Unbottled (bulk) milk:			
Grade "A" (Qts.)	...	.11	...
Grade "B" (Qts.)	...	.09	...
Certified:			
Quart bottles	.19	...	...
Pint bottles	.13	...	...
Half-pint bottles	...	.05	.05
Whole condensed:			
Quart bottles	...	.29	...
Half-pint bottles	...	.10	...
40-qt. cans	...	8.60	...
Heavy cream:			
Quart bottles	.68	.52	.60
Pint bottles	.38	.31	.35
Half pint bottles	.20	.17	.19
Bulk quarts	...	.47	.53
Bulk pints	...	...	.28
Bulk ½ pints	...	...	.15
Medium cream:			
Quart bottles	.57	.44	.49
Pint bottles	.32	.26	.28
Half pint bottles	.17	.15	.16
Bulk quarts	...	.39	.44
Bulk pints	...	...	.28
Bulk ½ pints	...	...	.12
Light cream (sweet or sour):			
Quart bottles	.44	.33	.38
Pint bottles	.25	.19	.22
Half pint bottles	.14	.11	.13
Bulk quarts	...	.27	.33
Bulk pints	...	...	.17
Bulk ½ pints	...	...	.09
Bulk (full 40 qt. cans)	...	10.80	...
Heavy sour cream:			
Quart bottles	.54	...	...
Pint bottles	.32	...	...

5. In the case of Vitamin "D" Milk the price which shall be charged shall not be less than 1¢ per quart and 1¢ per pint more than the prices listed in paragraph 4 of this order.

6. In the case of bulk milk sold to operators of bakers and commissaries representing average daily deliveries in any one month of 20 forty-quart cans or more and where delivery is made to a central commissary or other single point, the minimum price shall be $3.40 per forty-quart can. [fol. 81] 7. In the case of bulk cream sold to operators of bakeries or others buying for consumption or other utilization on the premises representing average daily deliveries in any one month of ten forty-quart cans or more of 40% cream or the equivalent thereof and where delivery is made to a central commissary or other single point, the minimum price for Heavy Cream shall be $17.60 per forty-quart can; the minimum price for Medium Cream shall be $14.80 per forty-quart can and the minimum price for Light Cream shall be $10.00 per forty-quart can.

8. In the case of Grade "A" Milk sold to schools in half-pint bottles having individual plug caps, the minimum price shall be 4¢ per bottle.

9. For the purpose of this order the term "stores" includes a grocery store, dairy products store, or any other fixed place of business from which milk or cream is sold to customers without delivery. The minimum price applicable to stores applies only to sales to consumers without delivery, and upon all sales where milk or cream is delivered elsewhere than at the store the minimum price applicable to a sale from a dealer to a consumer shall apply.

10. Until further notice, a deposit of not less than three cents per bottle shall be charged for all milk and cream sold by stores to consumers in bottles. An additional charge of not less than one cent shall be made for each non-reusable container supplied to a customer purchasing bulk cream.

11. In the case of milk sold to or on account of welfare and charitable agencies and eleemosynary institutions, the minimum prices shall be the prices required by the foregoing schedule to be charged by milk dealers to stores.

[fol. 82] 12. The prices fixed by this order shall not apply to milk or cream sold to hospitals using 40 quarts or more per day or to milk or cream purchased by the state or by any municipality, provided that the prices charged for such milk or cream are not less than the appropriate class price required to be paid to producers for such milk.

13. As an emergency measure to afford relief to needy families, milk may be sold through welfare or baby health stations operated by or under the supervision of the Department of Health of New York City, to accredited needy families certified to by the Department of Health of New York City at a price not less than eight cents per quart. Producers shall be paid the established class 1 price for milk so sold.

14. In the City of New York only it shall not be unlawful for any milk dealer who, since April 10, 1933, has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and the same difference may apply to sales of such milk in such city from stores to consumers.

15. In the County of Nassau, the minimum prices to be charged for Grade "A" pasteurized milk shall be those listed in Paragraph 4 of this order for Grade "A" milk.

16. In the County of Nassau, the minimum prices to be charged for Grade "A" Raw milk shall be those listed in Paragraph 4 of this order for Grade "B" milk.

17. In the County of Suffolk the minimum prices to be charged for Grade "A" raw milk shall be the following:

[fol. 83]

	By milk dealers to consumers	By milk dealers to stores and restaurants	By stores to consumers
Grade "A" Raw:			
Quart Bottles	$ .15	$ .13	$ .14
Pint "	.10	.08	.09
Half pint "	...	.04½	...

18. In the County of Suffolk the minimum price to be charged for bulk milk to be sold by milk dealers to stores,

restaurants, hotels and camps shall not be less than $.09 per quart.

19. The term "Heavy Cream" as used herein means cream containing 40% of milk fat; the term "Medium Cream" as used herein means cream containing 30% of milk fat; and the term "Light Cream" as used herein means cream containing 20% of milk fat. Any cream containing a greater percentage of milk fat than hereinbefore provided for each respective grade shall be sold at a minimum price correspondingly greater than that fixed for the respective grade.

20. The minimum prices to be charged and paid for cream sold by milk dealers to ice cream manufacturers shall be as follows:

When the quantity sold is not more than five forty-quart cans the dealer to store price as fixed by paragraph 4 of this order.

When the quantity in a single delivery is more than five forty-quart cans of Heavy Cream or its equivalent in Medium Cream or Light Cream, the price for Heavy Cream shall not be less than $16.40 per forty-quart can; the price for Medium Cream shall not be less than $13.30 per forty-quart can, and for Light Cream the price shall not be less than $10.00 per forty-quart can.

[fol. 84] When the quantity in a single delivery is more than ten forty-quart cans of Heavy Cream or its equivalent in Medium Cream or Light Cream, the price for Heavy Cream shall not be less than $15.80 per forty-quart can; for Medium Cream not less than $12.75 per forty-quart can; and for Light Cream not less than $9.45 per forty-quart can.

When the quantity in a single delivery is more than one hundred twenty-five forty-quart cans of Heavy Cream or its equivalent in Medium or Light Cream, the price of Heavy Cream shall be not less than $14.85 per forty-quart can; for Medium Cream not less than $11.75 per forty-quart can; and for Light Cream not less than $8.45 per forty-quart can.

21. The minimum prices to be charged and paid for plain condensed milk sold by milk dealers to ice cream manufacturers shall be as follows:

When the quantity is not more than five forty-quart cans the dealer to store price as fixed by paragraph 4 of this order.

When the quantity in a single delivery is more than five forty-quart cans of plain condensed milk, the price shall not be less than $8.00 per forty-quart can.

When the quantity in a single delivery is more than ten forty-quart cans of plain condensed milk, the price shall not be less than $7.45 per forty-quart can.

This order shall take effect at 1:00 A. M. on Monday, June 11, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets.

Dated at Albany, New York, June 5, 1934.

[fol. 85] EXHIBIT "E" TO COMPLAINT.

§ 38. When injunction may be obtained.—In an action in the supreme court for the recovery of a penalty or forfeiture incurred for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, an application may be made on the part of the people to the court or any justice thereof for an injunction to restrain the defendant, his agents and employees from the further violation of such provisions. The court or justice to whom such application is made, shall grant such injunction on proof, by affidavit, that the defendant has been guilty of the violations alleged in the complaint, or of a violation of any such provision subsequent to the commencement of the action. No security on the part of the plaintiff shall be required, and costs of the application may be granted or refused in the discretion of the court or justice. If the plaintiff shall recover judgment in the action for any penalty or forfeiture demanded in the complaint, the judgment shall contain a permenent injunction, restraining the defendant, his agents and employees from any further violation of such provision of this chapter or of any other law the enforcement of which is within the jurisdiction of the department or of the rules of the department. Any injunction, order or judgment ob-

tained under this section may be served on the defendant by posting the same upon the outer door of the defendant's usual place of business, or where such violation was or is committed, or in the manner required by the civil practice act, and the rules and practice of the court. Personal serv- [fol. 86] ice of the injunction shall not be necessary when such service cannot be secured with reasonable diligence, but the service herein provided shall be deemed sufficient in any proceeding for the violation of such injunction.

§ 39. Penalties for violation of chapter or other laws.— Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are hereinafter prescribed, be subject to a penalty in the sum of not less than twenty-five dollars nor more than one hundred dollars for the first violation, nor more than two hundred dollars for the second and each subsequent violation; provided, however, that for a violation by a retail merchant of section two hundred and twelve of this chapter, or of article thirteen-a of this chapter, the minimum penalty shall be ten dollars. When such violation consists of the manufacture or production of any prohibited article, each day during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the [fol. 87] milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall constitute a separate violation. When the storage of any article is prohibited beyond a certain period, each day during which or any part of which any article is

so stored beyond the period provided for by this chapter, shall constitute a separate violation.

A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law the enforcement of which is within the jurisdiction of the department, may be released, settled or compromised before the matter is referred to the attorney-general as provided in section forty-four of this chapter, and thereafter may be released, settled or compromised by the attorney-general, either before or after an action is brought to recover such penalties.

§ 40. Penalty for violation of rule or order.—Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department shall be subject to a penalty not exceeding the sum of two hundred dollars for each [fol. 88] and every offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

[fols. 89–92] EXHIBIT "F" TO COMPLAINT

§ 41. Violation of chapter a misdemeanor.—Except as otherwise provided by the penal law, a person who by himself or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE AND APPOINTMENT OF SPECIAL MASTER

This cause coming on for further proceedings at this term, and it appearing to the Court, convened for this cause pursuant to Title 28, Section 380, of the United States Code, that an exceptional condition, as provided for in Equity Rule 59, requires a reference to a special master of the application of the plaintiff for an interlocutory injunction, such exceptional condition being the complexity of the evidence which must be presented in order that the issues may be determined, the length of time which will probably be required for the presentation of such evidence and the present congested state of the calendars of the District Court of the United States for the Southern District of New York and the United States Circuit Court of Appeals for the Second Circuit, it is

Ordered, adjudged and decreed as follows:

1. The application of the plaintiff in the above-entitled [fol. 94] cause for an interlocutory injunction is hereby referred to Charles C. Burlingham, Esq., of 27 William Street, New York, N. Y., as special master to hear and determine the issues therein, to take testimony and to report his findings of fact and conclusions of law thereon with all convenient speed.

2. The master shall have all such powers as are conferred on masters by the rules of practice for the courts of equity of the United States.

3. The master shall return to the Court with his report a stenographic transcript of all the evidence taken before him, of all his rulings and the exceptions to rulings and of all proceedings held before him, together with all exhibits and depositions which shall have been presented to him.

4. The master shall be allowed his actual expenses and a reasonable compensation for his services, to be fixed hereafter by the Court. The allowances to the master, the com-

pensation paid to his stenographic and clerical assistants and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter shall direct.

5. The master shall, before submitting his final report and in accordance with the practice in this Court, prepare and serve on the solicitors for the respective parties a draft of such report and shall accord to the parties a period of five days from the date of the mailing of such draft within which they may file objections to the report or make sug- [fols. 95–98] gestions of amendment. Upon consideration of such objections or suggestions the master shall settle and sign his report and file the same forthwith in the office of the Clerk, together with a statement of any objections thereto by any of the parties.

Dated December 26th, 1934.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. Alfred C. Coxe, United States District Judge.

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

Charles H. Baldwin and Kenneth F. Fee and John J. Bennett, Jr., upon information and belief, each in his respective official capacity as a defendant herein, for an Amended Answer to the Amended Bill of Complaint, respectfully plead as follows:

1. They deny each and every allegation of paragraph "Twenty-fifth" of the said complaint.

2. They deny each and every allegation of the third, fourth and fifth sentences of paragraph "Thirty-fourth" of the said Complaint. The statute originally recommended by the Pitcher Committee made no provision for fixing any

minimum resale prices, and hence had no need to consider any differential or other adjustment of competitive condi-
[fol. 100] tions arising from the fixing of minimum resale prices. Certain data in the report of the Committee did indicate the necessity or advisability of a differential if and when minimum resale prices were fixed, and the bill which was enacted and became Chapter 158 of New York Laws of 1933 had the support of the Committee and was made a part of its final report.

3. They deny each and every allegation of paragraph "Thirty-sixth" of the said Complaint.

4. They deny, because they have not sufficient knowledge and means of information to form a definite view as to the truth or falsity of such allegations, and to put the plaintiff to its proof relative thereto, each and every allegation of paragraphs "Twenty-fourth", "Twenty-seventh", "Twenty-eighth", "Twenty-ninth", "Thirty-first", "thirty-second", and "Forty-sixth" of the said Complaint, and as to that part of paragraph "Eighth" of the plaintiff's Complaint in which plaintiff alleges that it "has duly kept, observed and performed all the provisions of said Sanitary Code and the Regulations adopted thereunder".

As an affirmative defense show:

5. That on or about the 10th day of April, 1933, by Chapter 158 of the Laws of 1933 which was approved by the Governor of the State of New York and became Law on the said day, there was added Article 25 to the Agriculture and Markets Law, Chapter 69 of the Consolidated Laws of New York.

6. That the said Article created the Milk Control Board, to continue in existence until the 31st day of March 1934, and authorized the said Milk Control Board to fix by Official Order maximum and minimum prices for milk, including the prices to be charged by dealers upon sales of milk
[fol. 101] to stores and those to be charged by stores to consumers except for consumption upon the premises.

7. That subsection (c) of Section 317 of Article 25 provided as follows:

"It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of

purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

8. That on or about the 17th day of April, 1933 the Milk Control Board by Official Order fixed the minimum prices which could be charged in the City of New York upon the sale of fluid milk in bottles by milk dealers to stores and upon the sale of fluid milk in bottles by stores to consumers.

9. That it was provided in and by the said Official Order that in the City of New York it was not unlawful for any milk dealer who on April 10, 1933 was engaged in the business of purchasing and handling milk not having a well advertised trade name to sell fluid milk in bottles to stores in such City at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name.

10. That on or about the 5th day of May, 1933 the Milk Control Board by Official Order No. 12 determined that the phrase "well advertised trade name" as employed in the said subsection referred to the plaintiff and its trade name.

11. That paragraph "11" of Official Order No. 35 provided as follows:

[fol. 102] "In the City of New York only it shall not be unlawful for any milk dealer who, on April 10, 1933 was engaged in the business of purchasing and handling milk not having a well advertised trade name to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and the same difference may apply to sales of such milk in such city from stores to consumers."

12. That on or about the 30th day of January 1934, by Official Order No. 57, the said Paragraph "11" was amended to read as follows:

"On and after the effective date of this Order and minimum prices specified in Paragraph 4 to be charged by milk dealers to stores and restaurants shall be applicable in all the territory covered by this Order, except in the City of New York. In the City of New York only it shall not be unlawful for any store to resell to consumers bottled milk at a price not more than 1 cent per quart below the store to consumer price fixed by this Order, provided such milk is purchased from any milk dealer who, on April 10, 1933, was engaged in the business of purchasing and handling milk not having a well advertised trade name."

13. That it was provided by Section 308 of Article 25 that no milk dealer (defined in Section 301 of the said Article to include the plaintiff by description) shall buy or sell or distribute milk unless such milk dealer shall obtain a license; that an application for a license was to be made within thirty days after Article 25 took effect for a period beginning the 1st day of May 1933 and ending the 31st day of March following upon blanks prepared under the authority of the Milk Control Board; that the applicant was to state, among other things, that he has complied with all rules and orders of the Milk Control Board and such other [fol. 103] facts with respect to the license as might be required by the Milk Control Board; and that the Milk Control Board might decline to grant a license or revoke or suspend one already granted for the reasons mentioned in the said Section 308.

14. That on or about the 10th day of May, 1933 the plaintiff made application in writing for a license to conduct its business as a milk dealer pursuant to Section 308 of Article 25; that by the said application the plaintiff agreed to comply with and obey the provisions of Article 25 and the rules and orders of the Milk Control Board.

15. That on or about the 15th day of August, 1933 a license was granted and issued to the plaintiff and that the said license remained in full force and effect until the day of expiration fixed therein.

16. That the bill of complaint in the present action was filed on April 26, 1934 and that the plaintiff prior thereto took no action whatsoever with reference to the provisions and orders mentioned in this defense.

Wherefore, the defendants pray that the relief prayed for in the said complaint may be denied, and the Complaint dismissed, and the defendants have judgment against the plaintiff for their costs of defending this suit.

John J. Bennett, Jr., Attorney General of the State of New York; Samuel Kramer, Special Assistant Attorney General; Henry Epstein, Solicitor-General; Henry S. Manley, Counsel to the Department of Agriculture and Markets, Solicitors for the Defendants.

[fols. 104 & 105] *Duly sworn to by Samuel Kramer. Jurat omitted in printing.*

[fol. 106] In United States District Court

[Title omitted]

Order Substituting Party Defendant—March 9, 1935

On the annexed stipulation, it is

Ordered, that Peter G. Ten Eyck who has succeeded the defendant Charles H. Baldwin as Commissioner of Agriculture and Markets of the State of New York, be substituted as a party defendant in the above entitled action in the place of the defendant Charles H. Baldwin and that the said substitution shall be without prejudice to all the pleadings and proceedings heretofore had herein and shall not in any other wise affect the status of this case.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. Alfred C. Coxe, United States District Judge.

[fols. 107-109] In United States District Court

[Title omitted]

Consent to Substitution

The undersigned consent that Peter G. Ten Eyck, who has succeeded the defendant Charles H. Baldwin as Com-

missioner of Agriculture and Markets of the State of New York, be substituted as a party defendant in the above entitled action in the place of the defendant Charles H. Baldwin and that the said substitution shall be without prejudice to all the pleadings and proceedings heretofore had herein and shall not in any other wise affect the status of this case.

Dated, New York, March 6th, 1935.

Milbank, Tweed, Hope & Webb, Attorneys for Plaintiff. John J. Bennett, Jr., Attorney General, by Samuel Kramer, Special Assistant Attorney General. Henry S. Manley, Attorney for Defendants Charles H. Baldwin and Kenneth F. Fee.

[fol. 110] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, et al., Defendants

Narrative Statement of Evidence

Before Hon. Charles C. Burlingham, Special Master

[fol. 111] APPEARANCES

Milbank, Tweed, Hope & Webb (Timothy N. Pfeiffer, John E. Lockwood and Edgar P. Baker, of Counsel), appearing for the plaintiff, Borden's Farm Products Company, Inc.

Henry S. Manley, Counsel for Department of Agriculture and Markets, appearing for defendants, Peter G. Ten Eyck and Kenneth F. Fee.

Samuel Kramer, Special Assistant Attorney General, appearing for defendant, John J. Bennett, Jr.

[fol. 112] JOSEPH A. PICKETT was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am Vice President in charge of sales of Borden's Farm Products, with which I have been connected for the past thirty-one years. Prior to 1907 my duties were those of an assistant superintendent in charge of a branch at Tarrytown, N. Y. I then went to the main office in New York City in charge of the commission department and thereafter became manager of the butter and egg department. In 1921 I was made assistant to the general sales manager in charge of fluid milk branches in the Metropolitan Area, both retail and wholesale. The Metropolitan Area includes New York City, the Counties of Nassau, Suffolk, Richmond and Westchester and northern New Jersey. My duties were to look after the operations of all the company's sales branches and I was in contact with the various branch managers. I continued in that position until February, 1932 when I became general sales manager. All sales of fluid milk in the Metropolitan Area came under my direction. On December 23, 1934, I became Vice President in charge of sales.

[fol. 113] The principal steps in the distribution of milk in New York City comprise the collection of milk from farmers at numerous country plants, the cooling, pasteurizing and bottling of the milk either in the country or in city plants and the delivery of the milk to consumers and to stores by trucks operating from city delivery branches. All milk dealers follow the same general procedure. The business is divided into two main classes. The retail business involves the delivery to the consumer of his requirements each morning. The wholesale business involves the delivery to stores, restaurants, etc. of bottled milk in cases and bulk milk in 40-quart cans. All dealers employ substantially the same methods in carrying on both branches of the business.

Prior to the Report of the Loose Milk Commission in November, 1931, milk sold to stores for resale to consumers was approximately one-third in the form of bottled milk and the balance in the form of loose or bulk milk. The

same relative proportion between bottled milk and bulk milk had existed for many years prior to 1931.

I am familiar with the dealers engaged in the business of selling milk in New York City and have known many of them over a period of years. I have talked with them from [fol. 114] time to time concerning the conduct of the milk business in New York City. I am generally familiar with the prices at which bulk and bottled milk was sold by dealers to stores in New York City for some years prior to 1931.

In the sale of bulk milk through stores a 40-quart can was delivered to the store and the milk was dipped by the storekeeper into containers furnished by the customers. Bulk milk was sold simply as milk and not under any trade name. Bottled milk, on the other hand, was always sold under a trade name and under the Sanitary Code of the City it had to be identified by the name of the dealer.

Prior to 1931 there was no trade custom or practice in connection with the sale of bulk and bottled milk whereby different prices were charged by the Borden Company and by other dealers—with the exception, might I state, where price wars or local neighborhood wars broke out.

When the Loose Milk Commission filed its Report in November, 1931 recommending that the sale of bulk milk to stores for resale to consumers be prohibited, many dealers who had formerly only dealt in bulk milk and many bottled milk dealers also began to enlarge their plants and [fol. 115] take on extra supplies and attempt to get their share of the market, expecting that bulk milk would be eliminated. The conversion from bulk to bottled milk continued at an accelerated rate until the City Ordinance adopted pursuant to the recommendation of the Loose Milk Commission became effective on June 1, 1933.

Commencing in 1931 and continuing until the enactment of the 1933 Milk Control Law there was an increase in the number of dealers in New York City. There are approximately 25,000 stores in New York City where milk is sold for consumption off the premises. In selling milk to stores all that the dealer does is to deliver to the store the amount of milk requested. There is substantially no difference in either the methods employed or the services rendered by the Borden Company and by other dealers.

The price of milk began to decline in 1931 and such decline continued until the enactment of the 1933 Milk Con-

trol Law. In my opinion the reasons for such decline were the lack of buying power on the part of the public on account of the depression and the surplus of milk, which naturally caused a lowering of prices because of the abnor-
[fol. 116] mal conditions existing. Production was increasing and consumption decreasing, so that there was an increasing surplus of milk available to the New York City market. The normal surplus over demand for fluid consumption is approximately 20%. Another major factor in the decline of milk prices was the chaos that started through price-cutting and price wars in the city, which naturally reflected in the lower prices. After the publication of the Report of the Loose Milk Commission in November, 1931, it was generally felt among the dealers that bulk milk was going to be eliminated and dealers in their desire to build volume of business, the common practice was to go out and offer milk to other dealers' customers or to new stores, and in doing so attractive prices were offered. Naturally there was a lot of antagonism on the part of all the dealers due to their loss of business and in trying to protect their own business. That in itself naturally resulted in milk being sold at very low prices. Dealers who had been engaged exclusively in the sale of bulk milk to stores began to seek an outlet in the form of bottled milk. This chaos resulted from the various dealers seeking to get as much trade in the form of bottled milk as they could.

[fol. 117] By the Special Master:

By chaos I mean that there was just a price war, cut-throat competition. Prices were very unstabilized; there were no prices.

Direct examination.

By Mr. Pfeiffer (continued):

These price feuds would usually start in a particular neighborhood; it was generally due to one dealer going to a store served by another dealer and trying to get the business and offering milk at reduced prices. The dealers in order to protect their business lowered their prices to meet that competitive condition. Milk sold as low as 3¢ a quart; generally it was for a short duration. Another dealer would come in and offer bottled milk to our store-

keepers at 1¢ or 2¢ less than the regular price, and in order to protect our business we met that situation by giving the same price and, at times, going below the price offered. The practice as far as certain sections of the City were concerned was general but prices were not. The practice of the other advertised dealers was similar to ours. Some sections or boroughs of the city were worse than others, the Bronx, the lower east side of Manhattan and the Brownsville section of Brooklyn being generally recognized as probably the worst spots in the City. So far as Borden [fol. 118] was concerned in those areas there was no price structure at all.

For several years prior to the 1933 Milk Control Law Borden sold bottled milk to stores in all five boroughs of New York City.

Cross-examination.

By Mr. Kramer:

I did not appear before the Pitcher Committee nor was I called upon by the Committee or by any officer of the Borden Company to testify in the inquiry conducted by the Committee. I did not furnish the information set forth in the affidavits verified by Mr. Watson and Mr. Marcussen and submitted on behalf of the plaintiff when this suit was commenced in 1934. They discussed with me the general conditions existing, but the affidavits were based on figures obtained from our Comptroller.

Practically all my work is carried on in a supervisory capacity. Occasionally I visit the nine stores maintained by the Company in various parts of the City for the sale of milk to consumers.

Borden sells milk to approximately 12,500 stores in New York City which are served from 24 delivery branches. I do not know whether the number of stores served by the Company increased in 1932 over 1931. The number did increase in 1933 over 1932 but not in 1934 over 1933. After the ban on bulk milk, Borden made a concerted drive to sell bottled milk to stores which had theretofore been served [fol. 119] with bulk milk by independent dealers.

When bulk milk was permitted to be sold to stores Borden supplied each of the stores which it served with posters stating "Borden's Milk Sold Here," or words to that effect,

and efforts were made to induce the storekeeper to display such posters.

I do not have the records showing the specific prices at which Borden sold bulk and bottled milk from 1931 to 1934. Such records are in the possession of the Comptroller of the Company and I have had no occasion to look at them for some time.

The milk sold by all dealers must meet the standards prescribed by the New York City Health Department.

I do not know the exact prices at which independent dealers sold bulk or bottled milk to stores in 1931. Our knowledge of such prices was derived from general information that we would receive from our branch managers, or our outside or contact men who had occasion to visit stores when there was a difference in price or a loss of business. No record was made of those conversations; it was a verbal proposition over the telephone. My testimony concerning the prices at which independent dealers sold was based solely upon my recollection as to those verbal reports and [fol. 120] the general knowledge that we had of the prices that dealers charged. That general knowledge was based on the fact that a particular dealer was getting the regular price, whatever it was, or they were getting maybe half a cent less, or meeting competitive conditions. There were no published prices in newspapers. Borden and other dealers at times put out price notices to the retail trade.

Approximately 95% of all retail sales made in New York City are made by the plaintiff and four other companies and about 85% by Borden and Sheffield Farms Company, divided about equally between them. There has been very little price-cutting in the retail business. There was a slight decrease in Borden's retail business in 1931 as compared with 1930 and a decrease of more than 5% in each of the years 1932 and 1933 as compared with the preceding years. The causes of such decrease were the lack of buying power due to the depression and the conditions under which the business was conducted; all the companies were in that period when there was considerable price-cutting in the wholesale business the latter part of 1931 and 1932. There was probably a trend towards store business because of the lack of buying power, which increased wholesale business [fol. 121] or bulk milk. Milk was being sold cheap out of stores. There was a slight decrease in Borden's retail busi-

ness in 1934 as compared with 1933. Borden attempted to meet each price reduction in sales to stores but it did not succeed in maintaining its comparative sales to stores since in many cases where we were serving a store and somebody else had offered milk at a lower price, the business was lost even after we offered to meet the price.

Prior to the 1933 Milk Control Law there was no recognized differential between the prices at which Borden and the other advertised dealers sold their milk and the prices at which the independent dealers sold theirs. By that I mean that all dealers asked the same price and there were deviations, of course, from the prices they asked. The independent dealers asked the same price for bulk and bottled milk to stores as the advertised companies, and in many cases they got the price; and in many cases they did not get the price. I could not say in what percentage of cases the independent dealers failed to get the same price as Borden; with some companies it was the majority of cases and with other companies the minority. They did not sell at the same price all the time.

[fol. 122] By the Special Master:

It was a matter of bargaining. Either the store-keeper beat them down, or their purpose was to get increased sales volumes.

Cross-examination.

By Mr. Kramer (continued):

The highest percentage of the sales of some independent dealers were at the regular prices. I know that from practical experience of companies that we purchased. These companies included Clover Farms, Empire State Dairy and Evans Dairy, all of which had substantial retail and wholesale businesses. They competed with Borden before their purchase.

Central Dairy Company, which is affiliated with the plaintiff, conducts its business as an independent dealer. It sells to restaurants but I do not know whether it makes any bottled sales to stores. I have nothing to do with its operations.

The nine independent dealers whom I can now recall (including Ferndale and Morrisania) as having sold bottled

milk to stores in 1931 asked the same price as Borden did, but neither the independent dealers nor Borden sold all their milk at one price. In 1932 and 1933 up to the passage of the Milk Control Law in April probably very little of the [fol. 123] milk of independent dealers was sold at the same price as Borden's, because it was through the period there when a lot of price cutting was rampant.

By the Special Master:

The independent dealers received the regular price we received for some of their milk, but on account of the tactics of the dealers and the feud that was carried on in the territories here, probably a great percentage of their milk was sold at a lower price.

Cross-examination.

By Mr. Kramer (continued):

If the independents lowered their prices to meet price competition Borden likewise lowered its prices. Before the ban on bulk milk th majority of the independent dealers in many cases sold bulk milk to stores at a price from 40¢ to 50¢ per 40-quart can below the price charged by Borden and Sheffield. It was generally understood that the dealers in bulk milk always got the same price for bulk milk as Borden and Sheffield. Of course, they deviated from those prices like everybody else did, but a lot of their milk was sold at the regular top prices. They sold some of their milk at 40¢ to 50¢ per can less.

JAMES ARCHIBALD COULTER was called as a witness on behalf of the plaintiff and testified as follows:

[fol. 124] Direct examination.

By Mr. Pfeiffer:

I am connected with Dairymen's League Cooperative Association. I have been a member since 1921, a director since 1922, a member of the Executive Committee since 1923 and Treasurer since June, 1934. Since 1915 I have

owned a herd of cows and produced milk for sale. From 1927 until the end of 1933 I had charge of sales of fluid milk by the League in New York City. During that period the League was engaged in the sale of fluid milk at wholesale but not at retail. I had contacts from time to time with dealers in the City. It was part of my job to keep in touch with market conditions relating to the wholesale business and I am familiar with the conditions which prevailed until the enactment of the 1933 Milk Control Law. I never heard of any custom or trade practice whereby Borden's milk was sold to stores at a differential from the milk of other dealers, and I believe there was none.

Prior to the Milk Control Law the prices paid by dealers purchasing from the League were a matter of negotiation between such dealers and the League acting through its Executive Committee, of which I was a member. That negotiation had to be based on a knowledge of production conditions in the country and sales conditions in the City. [fol. 125] When our Board met once a week we depended on them for the picture of production conditions. Previous to that meeting the Executive Committee met with dealers individually sometimes and always with committees of dealers and very thoroughly went over the sales conditions in the market in the City. As a part of our getting the picture we were operating sales branches in the City in the wholesale business, and as the member of the Executive Committee in charge of sales branches it was my custom to gather the managers of those branches into the office and we went over very thoroughly, from their viewpoint and from the figures that we had of those businesses, the conditions that existed in the market. So that by putting those two together we were able to have in our possession as complete knowledge as we felt we could obtain in regard to both sales conditions and production conditions in the country. In the negotiations that we had with other milk dealers to whom we sold, they frequently stated what their prices were. On the basis of all the information which we could get from all the sources, we determined the prices at which we would sell classes 1, 2, 3 and the other classes of milk to dealers in the City.

[fol. 126] I do not recall what prices we got from Borden and from other dealers in the City but the price at which we sold milk to all dealers was the same.

I was familiar with the general sales prices in the City out of our branches and the general sales prices which were charged to stores by our competitors and I am able to state that in my opinion there was no trade custom or practice in the period up to the enactment of the Milk Control Law whereby the milk of other dealers was sold at a differential under that of Borden.

Cross-examination.

By Mr. Kramer:

The Dairymen's League is one of the dealers included in the classification as selling well advertised brands and has taken no action to enjoin or to declare invalid the differential provision.

The League has six subsidiary companies which it acquired by purchase: Sachs Dairy, Delancey Milk Company, Beakes Dairy, Beakes Riverdale, Hauk & Schmidt and Tietjen & Steffen. I do not recall the prices at which these companies sold bulk or bottled milk to stores from 1930 to 1933 but I assume that there are records which would give this information. I likewise do not recall the [fol. 127] prices at which Borden and other dealers sold during this period.

In 1932 the League inaugurated an advertising campaign in connection with the sale of bottled milk under its trade name Dairylea. This campaign was continued for approximately fifteen months until April 1, 1933. During that period I think the League sold bottled milk to stores at about the same price as Borden. I do not know how much bottled milk was sold under the trade name Dairylea in 1932 and 1933. During the early part of 1932 I think the League was unable to sell bottled milk under its trade name to stores at the same price as Borden and Sheffield, and thereafter until the enactment of the 1933 Milk Control Law I don't know. During the latter period the condition of the market was so unsettled that I do not think anyone could tell what anyone else's price was.

By the Special Master:

It was during the latter period that the unsettled state of the market upset everything so that there were no fixed prices.

[fol. 128] Cross-examination.

By Mr. Kramer (continued):

The League discontinued its advertising campaign in April, 1933 because there was a grave question in our minds whether advertising for fifteen months would make a well advertised brand and we filed a protest against being listed that way with the understanding that future events would decide whether we would continue to be listed that way or not. The League has done no advertising since that time. The advertising campaign was not discontinued because we were unable to make any progress in the sale of the Dairylea brand of bottled milk to stores.

The League sells about a third of its milk to Borden which purchases the greater part of its milk from the League. Borden has been one of the principal customers of the League since 1916. The League sells milk to some of the independent dealers in New York City. There is no difference in the quality of the milk sold to them and to Borden.

Prior to the Milk Control Law the League sold milk to many dealers in many markets on a classified price basis and the farmers who were our members received the blended price from the sale of all our milk in all of our markets. Under the classified price plan class 1 milk is milk for fluid consumption, class 2 milk is milk for cream, [fol. 129] class 3 milk in general is for condensed and evaporated, and so on. Class 1 milk commands the highest price and the other classes are, as a rule, successively lower.

Mr. Pfeiffer stated that an explanation of the classified price plan was contained in the Report of the Pitcher Committee at page 109. It was stipulated that the Special Master might take judicial notice of said Report.

Cross-examination.

By Mr. Kramer (continued):

After the enactment of the 1933 Milk Control Law the six subsidiary companies of the League sold unadvertised milk and they sold it at the unadvertised price permitted by the differential provision. I do not know whether such milk

was of the same quality as the milk sold by the League under its trade name at the advertised price. There might be some difference in butter fat content but whether there was or not I don't know; if there were any such difference the premium brand would presumably be the better quality. There is quite a wide variation in the butter fat content of [fol. 130] the milk received at various country receiving plants from which shipments are made to the City.

Cross-examination.

By Mr. Manley:

The League and its subsidiary companies sell bottled milk under the name Dairylea and under the names of two of its subsidiaries, Beakes and Delancy. There was a decided increase in the amount of bottled milk sold under the name Dairylea in 1932.

I have never examined pages 259 to 261 of the Pitcher Report purporting to give the prices at which the League and other dealers were selling milk to stores in New York City in October, 1932. I do not know whether the Pitcher Report is correct in stating that the League was customarily making its sales at that period at a price 1¢ or more below the price of Borden and Sheffield. The big bulk of our sales in 1932 were bulk sales rather than bottled sales. I do not know the amount of bottled milk sales which the League made nor do I know the prices stated in the application of the League for its 1933 license.

The League filed a written protest against being listed as an advertised brand; we stated that, having advertised [fol. 131] for only about fifteen months, we felt that that was not long enough to establish a trade name as a well advertised brand. No proceedings were instituted to review the order listing us as an advertised dealer. We recently renewed our protest. I do not know whether this has been done at the direction of the Executive Committee nor do I know why the League wanted not to be listed any longer as an advertised brand.

Cross-examination.

By Mr. Kramer (continued):

After the enactment of the 1933 Milk Control Law sales of unadvertised bottled milk were made by subsidiaries of

the League because we did not feel that fifteen months of advertising established a well-advertised trade name. The Dairylea brand was selling at a price higher than the unadvertised brands sold by our own companies. It was not because we found by experience that we could not sell the Dairylea brand at the same price as Borden and Sheffield that we turned over to our subsidiaries a great deal of our milk to sell at the unadvertised price. We did not wait until we found out because we knew the unadvertised brand was going to sell at 1¢ less. If we could sell all our milk under the Dairylea brand we would, of course, have sold only that brand and got the 1¢ higher price, but we could [fol. 132] not sell our advertised brand in competition with other unadvertised milk.

Redirect examination.

By Mr. Pfeiffer:

In October, 1932 there was no price structure whatever in the sale of fluid milk to stores in New York City and this condition continued until the Milk Control Law. It was a period of price warfare.

JOSEPH A. PICKETT was recalled as a witness on behalf of the plaintiff and testified as follows:

Cross-examination.

By Mr. Kramer (continued):

The worst conditions in connection with price wars in the sale of bottled milk to stores in New York City existed in the first six months of 1932. It did not stop then; there were periods during which it would be lessened and then break out again. Practically all the independent dealers participated in these price wars. During all this time Borden lowered its prices to meet competitive conditions. The extent to which Borden lowered its prices to meet competitive conditions was more or less left to the judgment of the branch managers, whether they would lower their price to hold a certain customer, depending on the type of customer and the amount involved. With respect to certain custo-

[fol. 133] mers Borden lowered its price throughout this price war period. Until the enactment of the 1933 Milk Control Law Borden was selling at 9¢, 8¢ and 7¢ a quart, charging different prices to meet competitive conditions.

I have no knowledge of the correctness of the data contained in Table 104, Subdivision B appearing on page 258 of the Pitcher Report relating to prices at which bottled milk was sold to stores in October, 1932 since I don't know what stores were investigated. I knew at the time about this survey that was being made but I did not at any time after the survey have occasion to read the particular data in this Table 104. Borden has records showing the prices at which it sold Grade B bottled milk to stores in October, 1932.

Reid Union Dairy Company is a subsidiary of The Borden Company, the parent Company of the plaintiff. It sells as an unadvertised brand at 1¢ under the minimum price. I have nothing to do with its operations.

Defendants' Exhibit 1 is a copy of Schedule E of the application dated May 9, 1933 for a license filed by the plaintiff under the 1933 Milk Control Law, such Schedule E being given pursuant to question 15 requiring information as to sales prices. The application also contains the following questions and answers:

[fol. 134] "Have you complied with all rules and orders already made by the Milk Control Board? Yes.

"Do you agree to comply with all rules and orders hereafter made by the Milk Control Board? Yes."

Redirect examination.

By Mr. Pfeiffer:

It is my understanding that the data contained in Table 104 on page 258 of the Pitcher Report was based upon statements of various storekeepers to inspectors of the Department of Health who made inquiry as to the prices at which they were selling and buying milk.

Before the Milk Control Law the majority of dealers sold bulk milk 40¢ to 50¢ a can below the Borden price at particular times or in particular localities; it was true of the majority of dealers, but not in the majority of cases.

The number of stores to which Borden sold bottled milk increased in 1932 over 1931 because the market was un-

stablized at that time and there was the publicity given in the newspapers in reference to bulk milk so that bottled milk sales increased to stores immediately. A great many stores began to sell bottled milk in this transition period which never sold bottled milk before so that the total num- [fol. 135] ber of stores selling bottled milk greatly increased in 1932 over what it had previously been. Some of these stores were picked up by Borden and some by other companies. That same situation continued until June 1, 1933 when the ban on bulk milk took effect.

Cross-examination.

By Mr. Manley:

In the period preceding the enactment of the 1933 Milk Control Law our branch managers had instructions as to how far they could go and not lose business. The purpose of that was not to have prices go down to 1¢ or 2¢ or 3¢ a quart. I mean it was to use common sense and reason during this period. Our general policy was not to put our product lower than other similar products in the market because it was an unstable condition and it has always been our policy not to take an aggressive attitude to unsettle a situation that was bad at the time.

Independent dealers sold quite a volume of bottled milk to stores and consumers in turn purchased that milk all during the years 1931, 1932 and 1933 up to the time milk control came in. During that period we were in the depression, the public was watching its pennies on everything it purchased; the price of milk was low during 1932, both retail and at stores; and the elimination of bulk milk was quite a factor. Bulk milk was always sold at a lower price [fol. 136] than bottled milk and there were quite a number of dealers whose business was entirely in bulk milk. In 1931, 1932 and 1933 down to the time of fixed prices a considerable number of consumers in New York City bought independent milk in preference to Borden's because milk was being offered at very attractive prices and it was natural that the people went to the stores to buy it; and because the milk of independent dealers was cheaper than Borden's in the majority of the stores. Borden conducted an advertising campaign along the line of "There Are No Bargains In Milk" and "Smart Housewives Don't Try To Save On Milk" and things of that sort.

Redirect examination.

By Mr. Pfeiffer (continued):

There were many independent dealers in New York City who had local businesses in one borough or particular part of a borough from whom certain storekeepers had been in the habit for a long time of buying bulk or bottled milk. That was one of the reasons why those stores and customers bought the milk of that particular dealer, and the same was true in the case of stores which had been in the habit of buying from Borden and other dealers. From 1931 until the enactment of the 1933 Milk Control Law each dealer was trying to get just as much of the converted business from bulk to bottled milk as he possibly could, and, as a result, there was a price warfare going on all the time.

[fol. 137] Recross-examination.

By Mr. Kramer:

During the period of the depression before the Milk Control Law the storekeepers and consumers were watching their pennies and they were taking advantage of all these price-cutting tactics that were carried on where they could buy milk at very cheap prices. I don't think that the attitude of the public buying milk and saving its pennies has changed. The purpose of the Borden advertising campaign to which I referred was not against the price appeal. The purpose was to increase sales in general.

William J. McKay was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have for many years been an independent milk dealer in New York City. Since 1914 I have had my own business. During that period I have kept in touch with the marketing and distribution of milk in the City. I am President of the Waddington Milk Company, Arnstein Beckman Company, McKay Milk Products and Oakdale Farms.

Waddington and Arnstein Beckman are and have for the past four or five years been engaged exclusively in the wholesale business in Manhattan and the Bronx, respectively, and McKay Milk Products is engaged largely in the retail business in Brooklyn.

[fol. 138] Prior to November, 1931, there was a very small number of wholesale dealers supplying bottled milk to stores in New York City. The majority of the dealers sold bulk milk. For a number of years I was familiar with the prices obtained by dealers for bulk milk. Prior to November, 1931 there was no trade custom or practice whereby bulk milk was sold by independent dealers at a price differential from that of Borden and Sheffield. In periods when there was a large surplus of milk there were some variations from the normal rule of sales of bulk milk at the same price by all the dealers.

Starting in 1931 we had a very unusual production of milk furnished, and due to very unusual competition on the part of some of the unorganized producers throughout the State this milk was offered at a great variance in price to small dealers in the City. After the Report of the Loose Milk Commission it seemed that everybody made an attempt to take other people's business by getting bottled milk into the hands of the people that were accustomed to selling bulk milk. There was an increasing state of uncertainty concerning the price at which bulk milk was to be sold and was in fact sold. Bulk milk of independent dealers was sold at a differential under that of Borden and Sheffield only in cases where small dealers were attempt-

[fol. 139] ing to take business away from other companies that had what they considered a legitimate custom of selling to the different stores. The price of bulk milk got down as low as 4¢ a quart. From November, 1931 until the enactment of the 1933 Milk Control Law, I normally sold bulk milk to stores at the same price at which I understood Borden and Sheffield were selling.

In most all cases before November, 1931, one dealer would serve a store with all of their supply. After the Report of the Loose Milk Commission all or some of the smaller dealers seemed to feel that they had the same privilege of selling to that store as we did, although we may have served them for a period of years, and by taking that privilege, it brought about unusual competition, the store-

keeper taking advantage of it, and, naturally, a reduction in price from what we may call the natural or regular price that we were supposed to sell for. It was my practice to reduce the price when I had to in order to retain my customer. I think that this was the general situation throughout the industry in New York City after November, 1931.

With one or two exceptions there was no trade custom or practice in the period prior to November, 1931 whereby the bottled milk of independent dealers was sold to stores [fol. 140] at a price under that of Borden and Sheffield. One of the exceptions was Sunshine Dairy which sold at a reduced price. My companies normally sold at the same price as Borden and Sheffield. After November, 1931, the practice seemed to be that anybody would sell at any price for the sake of getting the customer. It was a period of price warfare which in many cases took the form of local warfares in various areas of the City. A grocery store would put up a sign in the morning about milk at a reduced price. Naturally, he had bought at a reduced price, and that would spread throughout his whole territory. Maybe after a week or ten days it would get partly straightened up. The first thing you know it would break out in another section, and it would spread over the City in that way, naturally bringing about a reduction in price almost general all the way around. These price wars were of varying intensity from time to time and from area to area.

I have no connection in any way with the plaintiff.

Cross-examination.

By Mr. Kramer:

The prices charged by my companies were always the same as Borden and Sheffield until in 1933 the conditions came about where we had to meet competition to retain our [fol. 141] customers. If it were Borden or Sheffield or anybody else, we met the competition and reduced our prices to hold our customers. I have never reduced our prices below Borden and Sheffield. I think the records will show that. I have no recollection of the prices charged in the early part of 1933. Whatever information appears in applications of my companies for 1933 licenses is correct.

There was a very small number of dealers selling bottled milk to stores prior to the Report of the Loose Milk Commission but I do not know exactly how many. There were

dealers who were equipped for bottling milk who did not sell bottled milk to stores; Waddington Milk Company was one. The only time when there was a difference in prices between the advertised brands and the independent dealers was when some small dealers were trying to get the business away from the larger companies. That condition has existed for a number of years, but it got much worse after 1931 up to the Milk Control Law. The number of small dealers increased after 1931. I should say that from September, 1932 until the Milk Control Law, 50% of the dealers sold below the standard price from 1¢ to 3¢, sometimes 3½¢ and 4¢. If I had no competition to take my customer away from me, I continued to sell at the same price as Borden and Sheffield; if somebody attempted to take my [fol. 142] customer away I met the competition and sold them at whatever he offered to sell for.

I am now selling my milk at the unadvertised price. I testified in 1934 at the joint hearing before the Senate and Assembly Committees on Agriculture that the reason I did not want to sell at the unadvertised price was that I could not do so without sustaining a loss. If I could sell at 1¢ below the minimum price without a loss, I would still object to the differential. I disagree with the State on branding my milk as a cheap, inferior product to be sold below Borden or Sheffield or any advertised brand, because I can prove it is not. I am compelled to sell at 1¢ below the minimum price; natural advertising by the State of the prices to go into every newspaper in the hands of every groceryman and every customer in New York City almost makes it compulsory for me to sell at that price if I want to stay in business.

Redirect examination.

By Mr. Pfeiffer:

I have got to sell at the lowest price at which I am authorized to sell due to the State's advertising of the price. I am unable to compete selling my milk at a higher price than the milk of the other independent dealers. I would be able to sell my milk at the same price as Borden if all [fol. 143] other dealers had to do the same thing. The volume of sales of bottled milk to stores which my companies enjoyed prior to the enactment of the Milk Control Law was obtained on the basis of charging the same as

Borden and Sheffield. Since the enactment of the Law which permits unadvertised brands to be sold at 1¢ below the minimum, I am unable to retain that business unless I take advantage of the differential.

Recross-examination.

By Mr. Kramer:

Arnstein Beckman sells all of its milk in bottled form to stores. It has lost fully 25% of its business since the Milk Control Law went into effect.

Cross-examination.

By Mr. Manley:

Before the Milk Control Law our price was the same as Borden but in cases of extreme competition we went down as low as anybody else to retain our business. Arnstein Beckman and McKay Milk Products were not selling bottled milk to stores in general as low as 6¢ a quart in February and March, 1933. The information furnished in the applications of these companies for 1933 licenses was taken from our records and is correct.

[fol. 144] Redirect examination.

By Mr. Pfeiffer (continued):

Prior to the Milk Control Law my company sold about 60,000 quarts of fluid milk a day.

August Elsner was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am connected with the plaintiff in the position of supervisor of service, which I have occupied since the first of the year. From the fall of 1932 until that time I was assistant wholesale manager in direct charge of the wholesale branches of the plaintiff, and from 1928 to 1932 I was distribution

manager. My duties brought me in constant contact with the branch managers. From 1917 to 1928 I was superintendent of the Brooklyn wholesale division. I have been in the milk business in New York City since 1902 and know a very large number of the dealers engaged in the business and am familiar with the customs and practices.

Prior to November, 1931 it was the custom of all dealers to sell bulk and bottled milk at a price and to hold your business; if the competitor tried to take it away from you, you sold at whatever the competitor offered. This same custom prevailed throughout New York City until the enactment of the Milk Control Law. Subsequent to the [fol. 145] Report of the Loose Milk Commission in November, 1931 practically everybody had a different price; everybody was trying to get business. There were so many dealers going into the business, new ones, there was such a surplus of milk on the market, everybody was trying to get into the bottled milk business, so they started to cut prices in general, and naturally when one dealer had a competitor go into a store and offer a cheaper price, he would turn around and do the same thing to his competitor, and that started a general chaotic condition.

Cross-examination.

By Mr. Kramer:

I do not know the prices at which bulk or bottled milk was sold by Borden from 1931 until the enactment of the 1933 Milk Control Law, and I have no records showing the prices at which independent dealers sold during that period. My testimony is based upon my general recollection as to what prices were during this period.

FREDERICK DOUGHERTY was called as a witness on behalf of the plaintiff and testified as follows:

I have been connected with the plaintiff since 1917. From 1924 until 1930 I was superintendent of the East 17th Street [fol. 146] Branch in Manhattan. In 1930 I became assistant wholesale manager and remained in that position until 1932 when I returned to branch activities. I am now superintendent of the West 18th Street Branch.

I am familiar with the trade customs and practices in the wholesale and retail distribution of fluid milk in New York City during the period that I have been with the plaintiff. Up to the Milk Control Law in the sale of bulk milk there was a standard price for all dealers; everybody strove to get the same price all around. With the possibility of the elimination of bulk milk there was a wild scramble for conversion. The dealers that had never handled bottled milk before began to come into the field, and in order to secure business would offer what we considered ridiculous prices. I don't know just what the dealers received from the storekeeper, but on the lower east side I have seen bottled milk sold for 4¢ to 8¢ a quart and given away upon the purchase of other articles. In the period from the fall of 1931 to the spring of 1933, there was a price warfare going on in the sale of milk to stores; it was very general in my territory; it would become spotty at times, it would improve and then go back.

In the sale of bottled milk there was no differential between the prices of the independent dealers and of Borden [fol. 147] and Sheffield until the proposal of the abolition of bulk milk; then the price of bottled milk began to tumble and it remained in an upset condition until the Milk Control Board established the price.

Cross-examination.

By Mr. Kramer:

I cannot give the specific prices at which Borden sold bulk and bottled milk during this period; the price was up and down so frequently that it would change two or three times in the course of a year. Before milk control Nicosia Brothers, Trinity Dairy, Feld, Schwartz, Sam Bloom, Dairymen's League and others sold bulk milk at the same price as Borden. Before November, 1931 those independent dealers who sold bottled milk to stores sold at the same price as Borden did. During the transitional period following the report of the Loose Milk Commission they did not charge the price that Borden did; with one or two exceptions they charged less than Borden.

I have had occasion many times to visit stores to which Borden sold milk. In many cases these stores also sold bottled milk of independent dealers. I think that a housewife would buy an unadvertised brand as against the Bor-

den brand at the same price; it might be a very sentimental reason—they know the driver or are related to the driver or the dealer with whom the storekeeper is dealing. I can't give any other reason. I don't know what goes on in the mind of the average housewife.

[fol. 148] Redirect examination.

By Mr. Pfeiffer:

Borden never sold milk at a price as low as 4¢ a quart. There was so much competition between independent dealers for the store business that you would find 4 and 5 dealers in one store. It was more cut-throat competition between the small dealers themselves than between the small dealers and the advertised brands.

Joseph O. Eastlack was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am Assistant to the Vice President of the plaintiff and for the past five years I have had charge of the statistical work of the company. After graduating from the New York State College of Agriculture I became associated with the Maryland State Dairymen's Association and later with the Interstate Milk Producers Association of Philadelphia. My work with these organizations was directed to the making of studies of market conditions affecting the production and distribution of milk. It is part of my present duties to examine the records of the plaintiff relating to the distribution and sale of milk in New York City and I am familiar with such records.

The advertising expense of the plaintiff has never ex-[fol. 149] ceeded for any six months period ⅛th of a cent per quart of milk sold.

The witness testified concerning the volume of Grade B bulk and bottled milk sold by the plaintiff to stores in New York City during specified weeks in the years 1929 to 1934. The figures recited in such testimony were later tabulated and received in evidence as Plaintiff's Exhibit 4.

In assembling the figures covering the volume of bulk and bottled milk sold to stores in New York City the middle week of each quarter, beginning with the last quarter of 1929 and continuing to the end of 1934, was selected. This method was adopted in order to avoid unnecessary detail and I believe that it is indicative of sales for the entire period.

Sales for the week of February 11, 1932 indicate that the conversion from bulk to bottled sales to stores began to take place immediately after the publication of the Report of the Loose Milk Commission. This conversion became gradually intensified during the ensuing 15 months.

With reference to the week of August 11, 1932 there is some seasonal variation in the sale of fluid milk although [fol. 150] such variation in sales through stores is very much less pronounced than in the case of sales on retail routes. I have included figures for the week of April 6, 1933 since this is the last week preceding the enactment of the 1933 Milk Control Law. Figures for the weeks of May 25 and June 8, 1933 have been included since they were respectively the last week preceding and the first week following the effective date of the ban on bulk milk. There was a considerable jump in the volume of bottled milk sold in the latter week and much more than a corresponding decrease in the amount of bulk sales. The Company continued to sell bulk milk to hotels and restaurants but not to stores.

Plaintiff's Exhibit 1 is a chart I have prepared showing the range of prices at which the plaintiff sold Grade B bulk and bottled milk to stores in New York City, excluding the Borough of Richmond, from November, 1929 to November, 1934. It shows a continuing decline in the price at which milk was sold from November, 1929 to April, 1933. I have grouped on Plaintiff's Exhibit 1 the data for the period from November, 1929 to November, 1931 because that was the period prior to the publication of the Report of the Loose Milk Commission when there was nothing to disturb the normal relationship theretofore existing be- [fol. 151] tween bulk and bottled milk. In this period the Exhibit shows a wide variation in the price at which bulk milk was sold and I think that without question a wide range of prices always existed in the sale of bulk milk. It was always a highly competitive market. Before November, 1931 the amount of bottled milk sold through stores

was relatively quite small as compared to the amount of bulk milk sold through stores; the number of dealers handling bulk milk was very much greater than those selling bottled milk through stores.

I have grouped the period from November, 1931 to June 1, 1933 as the period of conversion of bulk to bottled milk sales; prices were tending downward. The entire industry that had been engaged in the bulk milk business was converted to a bottled milk status. The number of dealers selling bottled milk to stores increased very materially in this period and competition definitely became much more keen. Its broad effect was, of course, to result in a declining price level. Its immediate effect was to give rise to a series of skirmishes or wars or feuds in local territories in which price-cutting occurred in a very serious form. That situation continued throughout the period from November, 1931 to April, 1933. It was growing in intensity [fol. 152] throughout that period and perhaps the most intense period was the week that preceded the first fixing of prices by the Milk Control Board.

In September, 1932 a group of milk producers operating through what was known as the Emergency Milk Committee came to New York City and made strenuous efforts to urge the industry to take steps to improve the situation. There was some improvement which began to become apparent about the end of September, 1932 and which lasted until some time after the middle of November of that year. After that there was a redevelopment of the competitive conditions which had existed theretofore and, in fact, in an even more intense way.

I have included in Plaintiff's Exhibit 1 figures for the week of April 6, 1933 since this is the last full accounting week of the plaintiff prior to the enactment of the 1933 Milk Control Law. In that week Borden was selling bulk milk at prices ranging from 7¢ to 4¢ a quart. On April 17, 1933 the price of bulk milk to stores was fixed by the Milk Control Board at 6¢ a quart. In respect of the sale of bulk milk there was no differential between advertised and unadvertised brands. In the week of April 6th Borden was selling bottled milk at prices ranging from 9¢ to 6¢ [fol. 153] a quart with approximately 63% of its sales at 7¢ a quart. On April 17, 1933, by reason of the order of the Milk Control Board, we were required to put up our

prices of bottled milk to stores to 8¢; the independent dealers were permitted to continue to sell at 7¢.

By the Special Master:

The comments appearing on Plaintiff's Exhibit 1 were mine; they were my opinions based on a study of the Exhibit and my contemporaneous knowledge of market conditions from 1930 on; they were put on the Exhibit to give it some meaning in terms of what was happening every day.

Plaintiff's Exhibit 1 was received in evidence.

The witness testified concerning the volume of Grade B bulk and bottled milk sold by the plaintiff at each price during the period covered by Plaintiff's Exhibit 1. A tabulation of these figures was later received in evidence as Plaintiff's Exhibits 5 and 5a.

Direct examination.

By Mr. Pfeiffer (continued):

I wish to point out that the rise in price at which the plaintiff sold the greater part of its bottled milk in the [fol. 154] week of November 10, 1932 as compared with August 11, 1932 was the result of the activities of the Emergency Milk Committee which I have already mentioned.

Plaintiffs Exhibit 2 is a chart I have also prepared from the records of the plaintiff showing the volume of Grade B milk sold by it to stores in New York City for this same period from November, 1929 to November, 1934 and the proportion of such sales in bulk and bottled form. The week of November 14, 1929 has been taken as the base and sales for subsequent weeks are shown in relation to sales for such week. In the week of November 14, 1929, 80% of the Grade B milk sold by the plaintiff to stores in New York City was in bulk form and 20% in bottled form. This relative proportion continued to be approximately the same until 1932 when bottled sales began to increase and bulk sales to decrease, so that by the end of 1932 only half of the milk was bulk and the other half bottled. There still remained even in the last week of May, 1933 a considerable volume of milk being dispensed in bulk form, but after June 1, 1933 when the ban on bulk milk became effective

the original percentages were reversed and approximately 80% of the plaintiff's sales to stores were in bottled form and 20% bulk.

From November, 1929 to November, 1934, although [fol. 155] plaintiff's sales of bottled milk to stores increased by reason of the ban on bulk milk, its total sales to stores declined approximately 26%, this decline occurring entirely after May, 1933. The notes on Plaintiff's Exhibit 2 were made by me on the basis of my interpretation of what the Exhibit shows and my knowledge of what was transpiring in the industry.

Plaintiff's Exhibit 2 was received in evidence.

Plaintiff's Exhibit 3 is a chart I have also prepared comparing the volume of the plaintiff's sales to stores with the general level of consumption of milk in New York City. In so far as there are figures available indicating what the general level of consumption is, we are limited entirely to the receipts of milk in the Metropolitan Area as reported every month on a monthly basis by the United States Department of Agriculture. Those figures are ordinarily used by those who have occasion to measure consumption in New York City as indicative of the general level of consumption; I don't think anyone claims that they represent actual consumption. At least 80% of all the milk delivered in the Metropolitan Area is finally utilized in New York City proper.

[fol. 156] Taking November, 1929 as the base, consumption shows a decline in August, 1932 to approximately 93 and Borden's sales to stores were about 105. In that instance, however, the daily average for the month of August might not be strictly comparable to what happened in a given week of that month because an excessively hot week gives rise to a very rapid increase in consumption, this being the real explanation for the 20% surplus that has been referred to. This would be my explanation of the sharp increase in the sale of Borden's milk to stores in the week of August 11, 1932.

The week of June 8, 1933 was the first week after the ban on the sale of bulk milk to stores; Plaintiff's Exhibit 3 shows that the level of consumption increased in June as compared to May by about 1% but that Borden's sales

decreased in the week of June 8th as compared with the week of May 25th by about 9%. In quarts, that difference of 9% represents a loss of approximately 21,000 quarts a day.

As to the period after June, 1933 consumption declined from a level of about 95%, as compared with the base period, to a level of about 86% in November, 1934; Borden's sales to stores during the same period declined from approximately 98% to about 74%. The loss in this period amounted to an average of 41,539 quarts a day.

[fol. 157] In the retail business of the plaintiff since the fixing of prices by the Milk Control Board, the losses in sales up to November, 1933 were greater than the general decline in consumption, but after November, 1933 there have been no further losses.

Cross-examination.

By Mr. Manley:

The United States Department of Agriculture figures used in preparing Plaintiff's Exhibit 3 cover milk receipts in the entire Metropolitan Area; the figures relating to the plaintiff's sales to stores are limited to New York City. Those sales do not include sales of milk through public health stations maintained by the City. I suppose that such milk is sold in competition with all other milk sold in New York City. The plaintiff sells a considerable volume in terms of quarts through such public health stations, but relative to total a very inconsiderable volume. I have made no recent analysis of the percentage of the plaintiff's milk which is sold in New York City but from general knowledge I would say roughly about 80%.

Cross-examination.

By Mr. Kramer:

In Plaintiff's Exhibits 1, 2 and 3 I have excluded all [fol. 158] data relating to the Borough of Richmond because of the fact that it would merely widen the range of prices shown on Exhibit 1. Data for the Borough of Richmond was excluded from the other Exhibits only to avoid having the three exhibits based on dfferent data. This data can readily be furnished. The comments on Plaintiff's Exhibit 3 were placed there by me.

Plaintiff's Exhibit 3 was received in evidence.

Direct examination.

By Mr. Pfeiffer (continued):

In the week ending October 20, 1932, which is the accounting week of the plaintiff that most nearly coincides with the week during which the survey referred to in Table 102 at page 258 of the Pitcher Report was made, the plaintiff sold to stores in New York City 365,856 quarts of Grade B bottled milk at 10¢, 511,730 at 9¢ and 4,577 at various prices ranging from 12¢ to 6½¢; it sold 997,728 quarts of bulk milk at prices ranging from 9¢ to 4¢ of which 116,594 quarts were sold at 8¢, 535,064 quarts at 7¢ and 161,237 quarts at 6½¢. The Emergency Milk Committee, to which I have previously referred, came to New York City in September, 1932 and urged dealers to do what was possible to stabilize prices at a higher level than then existed and generally to take such steps as would alleviate [fol. 159] some of the chaotic conditions that existed in the market at that time. The record of the plaintiff indicate that during the period of the activity of that Committee a very large volume of bottled milk which previously had been sold at 8¢ a quart was raised to a 9¢ level, as shown by the figures I have just given. In the week of October 20th the largest percentage of the milk sold by the plaintiff to stores was at 9¢ with 1,454 quarts sold at 8¢; in the week ending August 11, 1932, before the activities of the Committee commenced, the plaintiff sold 558,701 quarts of bottled milk at 8¢. The figures for November, 1932 are substantially identical with those of October 20th but shortly after that the situation again reverted to that which existed before the activities of the Emergeny Milk Committee. In the week of February 9, 1933, which is the next week shown on Plaintiff's Exhibit 1, the largest percentage of the plaintiff's sales of bottled milk was down to 7¢ a quart; this was likewise true in March, 1933, as shown by page 3 of Defendants' Exhibit 1.

Refreshing my recollection by looking at Defendants' Exhibit 1, the plaintiff in March, 1933, actually sold to stores in New York City 2,259,261 quarts of milk at 8¢ per quart, 3,054,388 quarts at 7¢ and 294,962 quarts at various other prices from 6¢ to 9¢.

Page 1 of Defendants' Exhibit 1 is the price list of the plaintiff in effect during March, 1933; the list price of

Grade B bottled milk wholesale was 8¢, with the exception [fol. 160] that a price variation was recognized in Brooklyn where the price was 7¢. Page 3 of this Exhibit is a supplemental schedule which was filed for the purpose of showing the actual prices at which the plaintiff sold in March, 1933.

My estimate of the total amount of bottled milk sold to stores in New York City at the present time is something in excess of 1,000,000 quarts a day. I base this estimate upon an anlysis of figures published by Dr. Spencer relating to the channels through which milk is distributed in New York City and the amount of milk received in the Metropolitan area, as shown by figures published by United States Department of Agriculture. Approximately 80% of the milk received in the Metropolitan area is sold in New York City and this in November, 1934, on the basis of the receipt of a daily average quantity of 85,762 40-quart cans, amounted to 2,744,400 quarts per day. My estimate as to the channels of distribution at the present time is 40% retail delivered to homes, 39% bottled milk to stores and 21% bulk milk to buyers that are still permitted to use bulk milk. 39% of the total in November, 1934 amounts to 1,070,316 quarts a day. For the week of November 8, 1934, the plaintiff's sales of bottled milk to stores amounted to 151,341 quarts a day or 14.1% of the total sales to stores as estimated above.

I estimate that Sheffield, Renken and Dairymen's League [fol. 161] together sell 7.1% of the total volume of bottled milk sold to stores in New York City.

Plaintiff's Exhibits 4, 5 and 5a were received in evidence.

[fol. 162] Cross-examination.

By Mr. Kramer (continued):

In making my estimate with reference to the percentage of sales made in New York City at retail and at wholesale in bulk and bottled form, I was guided to some extent by the statements of Dr. Spencer at page 163 of the Pitcher Report where he indicates the channels of distribution in 1930 for the entire Metropolitan Area. On the changes that have been revealed in our operations as the trend toward one type of sales as against another, I made cer-

tain adjustments to reflect what I believed to be a reasonable picture of what has happened since 1930, and I made further adjustments for the situation which existed in New York City as compared to the balance of the Metropolitan Area.

I do not know the percentage of retail sales or the percentage of sales of bulk milk made by the plaintiff in New York City.

The Emergency Milk Committee was active in New York City for a period of two or three weeks beginning in September, 1932. My understanding is that the principal purpose of the Committee was to endeavor to include the independent farmers in one cooperative group and that except for the period mentioned in September, 1932, the Committee had little contact with dealers in New York City.

[fol. 163] I have nothing to do with the fiscal records of the plaintiff. My work relates entirely to general statistics covering production and sales as distinguished from accounting matters.

To my knowledge nothing appears in the public health stations to indicate the name of Borden's and no advertising of any kind is placed in these stations by the plaintiff. I know that nothing appears on the milk which is distributed at those stations.

In making the first comment to the left of Plaintiff's Exhibit 1, "Little bottled milk sold through stores and prices of bottled milk very stable," I based it on the fact that in our own sales the proportion of bottled milk was only 20% of the total and I think that no one questions that many dealers now engaged in the sale of bottled milk were then engaged exclusively in the sale of bulk milk. I do not know the proportion of bottled to bulk milk sales in the case of other dealers who sold both bulk and bottled milk. At page 163 of the Pitcher Report it is indicated that the amount of bottled milk sold to stores in New York City was not more than 12% to 15% of the total sales of milk through stores. Table 2 on page 32 of the Report of the [fol. 164] Loose Milk Commission indicates that 9.3% of the total sales of milk in the Metropolitan Area by 41 dealers in February, 1927, consisted of bottled milk sold to stores. My best estimate is that the percentage of wholesale bottled milk at that time was something less than 9.3% for the reason that the 41 dealers covered in that particu-

lar survey probably included all of the bottled milk dealers and the remaining dealers that were then engaged in business were probably engaged exclusively in the sale of bulk milk.

Sometime during the first half of 1932 there arose a condition whereby prices in Brooklyn tended to be lower than in the rest of New York City and lower list prices were established by the plaintiff in Brooklyn.

Conversion from bulk to bottled milk sales began at the end of 1931 in a very small way, and continued to gain momentum until by the spring of 1932 conversion was taking place very rapidly and continued to take place with increasing intensity until the very last day on which bulk milk could be sold to stores. The greatest amount of conversion took place just prior to the effective date of the ban on June 1, 1933. In the week May 25, 1933 some 20% of the plaintiff's wholesale business was still in bulk which later became bottled milk on June 1, 1933. Plaintiff's Ex- [fol. 165] hibit 2 indicates that the greater part of the conversion in its own business had taken place by the week of May 12, 1932; I do not know when the greater part of the conversion took place in the business of other dealers.

Plaintiff's Exhibit 2 does not include sales made by the plaintiff to public health stations; milk distributed by the City through such stations is not sold under the name of Borden's. All bottled milk sold to stores under the name of Borden's is covered in this Exhibit and all bulk milk is covered. No subsidiary or affiliated companies of the plaintiff sell milk in New York City under the name of Borden's and none of their sales are included in this Exhibit. Sales to schools in half-pint bottles are not included since these are not sales to stores.

I cannot say when cut-throat competition and price-cutting began in the sale of bulk milk because so far as I know they always have existed. In the sale of bottled milk to stores they became rather definitely apparent at the time the conversion from bulk to bottled milk began and existed throughout the period from November, 1931, to April 17, 1933. It is difficult to pick out a particular period and say that that is when price-cutting first became emphasized. [fol. 166] It was sort of like the snow ball accumulates. It started in November, 1931 and eventually led to the enactment of the Milk Control Law. It was becoming aggra-

vated month by month, day by day, sometimes almost hour by hour.

As indicated in one of the comments on Plaintiff's Exhibit 1, prices of bottled milk from November, 1929, to November, 1931 were very stable relative to what developed subsequently. I presume there was a little price-cutting in the sale of bottled milk in this period; I think when prices are not fixed it is sometimes human nature to cut prices to gain business.

I have not endeavored to prepare a chart indicating the sales of the plaintiff in the Metropolitan Area as compared to consumption in that area. I likewise have not prepared any chart indicating the sales to stores of Grade A bottled milk by the plaintiff. Such sales are very insignificant in relation to the total Grade A sales.

Cross-examination.

By Mr. Manley (continued):

The only way in which the United States Department of Agriculture figures are issued is on a monthly basis. In preparing Plaintiff's Exhibit 3 I assumed that the daily average of monthly figures indicating the general level of consumption and weekly figures for the plaintiff's sales would be a representative trend. There has been no effort to compare week for week or month for month the plain-
[fol. 167] tiff's figures with figures showing the receipts of milk in New York. I am aware that there is sometimes a considerable fluctuation in consumption within the same month, as for instance the week of August 11, 1932. High temperatures ordinarily result in increased sales and low temperatures have exactly the opposite effect. I think it is fair to assume that such a happening as the legalizing of beer on a certain date probably had an effect on milk consumption in New York City but I have no figures that would definitely indicate that it had. There are many factors of that sort that affect physical series of data that are impossible to measure. I believe changes in price of a commodity such as milk sometimes affect demand; after an increase in price it is conceivable that there may be some loss of consumption as a result.

In speaking of sales to stores I have included in the term "stores," restaurants, hotels, clubs and other institutions

defined as stores in the Law; public health stations in New York City are not included. In the Plaintiff's Exhibits concerning which I have testified the figures included only bottled quarts of milk and do not include smaller sizes, pints and half-pints. A very small part of the plaintiff's business is in smaller size bottles; not more than 2% or 3% is sold in either one of those sizes.

Plaintiff's Exhibit 1 shows that the price of bulk milk was [fol. 168] lower than that of bottled milk but there was certainly not an established differential between the prices of the two commodities. It indicates a common trade practice to maintain a lower level of prices for bulk than for bottled milk and this despite the fact that in various months some small volume of bottled milk sold at prices as low or even lower than the price of some small volume of bulk milk. I would certainly not apply the language "established differential" to the difference between the bulk and bottled prices.

I am unable to state what the percentage of store business in Grade B bottled milk bears to the entire fluid milk business in the Metropolitan area.

Page 3 of Defendants' Exhibit 1 shows a 7¢ price for the largest volume of store milk, but I can't say whether this was sold in Brooklyn or in Manhattan, or where it was sold. At that time the list price at certain branches in Kings, Queens and Nassau Counties was 7¢ but that does not mean that there were not 7¢ sales in other parts of the City. The list price in Manhattan and the Bronx was 8¢ at that time. Sales above 8¢ were probably made in Staten Island where prices tended to be higher than in any other part of the City. The last column on Plaintiff's Exhibit 5a shows only two prices for any volume of bottled milk larger than 4,000 quarts sold by the plaintiff in the week of April 6, 1933. These prices were 8¢ and 7¢. I [fol. 169] would not say that all the 7¢ milk was sold in Brooklyn since the volume of 7¢ milk was nearly twice that of the 8¢ milk and for that reason I am quite confident that some 7¢ milk was sold more or less throughout the City although it tended to be concentrated in Brooklyn. The same is true for sales in the week of February 9, 1933, except that as the time of the enactment of the 1933 Milk Control Law drew nearer, 7¢ milk tended to become more prevalent throughout the City rather than merely in Brooklyn. The

division of quantities as between 7¢ and 8¢ milk on February 9th as compared to April 6th is an indication of that.

The figures for the weeks of November 10th, August 11th and May 12th, 1932 show that there was a tendency for the milk at the higher price to be sold in Manhattan and the Bronx and the milk at the lower price to be sold in Brooklyn.

Redirect examination.

By Mr. Pfeiffer:

I have very little information as to the activities of the Emergency Milk Committee in the fall of 1932. The Committee conferred with dealers in the City and I believe that it made some surveys of the store situation and took such steps as it could by persuasion to urge that the market be stabilized, because at that moment it was in a headlong [fol. 170] flight toward even greater chaos than had previously existed. I think the Committee was primarily concerned in stemming the tide of lower prices and subsequent history showed that they did go lower in spite of the Committee's activities, although the records of the plaintiff show that prices did tend to stabilize while the Committee was active in the City.

[fol. 171] Recross-examination.

By Mr. Kramer:

The prices shown on page 1 of Defendants' Exhibit 1 were list prices. Page 3 of this Exhibit was purposely included to show the prices at which sales were actually made. List prices for January, 1933 were included but not actual selling prices though the plaintiff knew the actual selling prices at the time this tabulation was made.

The actual expenditures of the plaintiff for advertising in the last four years were as follows: For the six months ending June 30, 1931, $217,547.08; December 31, 1931, $192,-179.85; June 30, 1932, $177,946.20; December 31, 1932, $147,-244.09; June 30, 1933, $160,929.18; December 31, 1933, $188,-448.83; June 30, 1934, $233,177.46; and for the five months ending November 30, 1934, $153,272.73. These figures included all expenditures for publicity purposes of any nature.

In connection with sales made to Public Health Stations, the plaintiff promised the Mayor of New York to furnish 25,000 quarts of milk per day for distribution by the City through these stations. That is the quantity which is being distributed by the City and processed by the plaintiff.

I do not know what has been the range of prices in the sale of Grade A bottled milk to stores during the past five years. Grade A prices have been higher than Grade B prices.

[fol. 172] The volume of sales indicated in Plaintiff's Exhibits 2 and 3 refer to actual sales made by the plaintiff to stores in New York City and are not the result of taking a percentage of the total sales of the plaintiff in the Metropolitan area.

Redirect examination.

By Mr. Pfeiffer (continued):

Sales made by the plaintiff through Public Health Stations are not made under the Borden name. The milk is sold in paper containers upon which the name nowhere appears. To the best of my knowledge there is no advertising of any kind of the Borden name in these Health Stations.

Recross-examination.

By Mr. Kramer (continued):

The paper containers in which milk is sold at the Public Health Stations are delivered in pasteboard cartons. I do not know whether the plaintiff's name is on such cartons.

CHARLES H. THOET was called as a witness on behalf of the plaintiff and testified as follows:

[fol. 173] Direct examination.

By Mr. Pfeiffer:

I am Assistant Auditor of M. H. Renken Dairy Company, which is one of the four companies whose milk has been classified by the Milk Control Board as being a well adver-

tised brand. In the week commencing November 4, 1934 the Company sold 175,888 bottles of Grade B milk to stores, or 25,127 quarts a day.

ROBERT E. CROWLEY was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am the Comptroller of Sheffield Farms Company. In the week ending November 7, 1934 the Company sold 173,614 quarts of Grade B bottled milk per day to stores in New York City.

JOSEPH J. CATTERALL was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am a cost accountant with Dairymen's League Cooperative Association. In the week ending November 12, 1934 Dairymen's League sold 5,234 quarts of Grade B bottled [fol. 174] milk per day under its trade name Dairylea to stores in New York City.

Cross-examination.

By Mr. Kramer:

There was considerably more milk sold under other names by Dairymen's League. I can not give the exact amount.

Mr. Pfeiffer stated that subject to the obtaining of the testimony of one further witness who was not then available the plaintiff rested its case. Motions to dismiss the bill of complaint were made by Mr. Kramer and Mr. Manley on the ground that the plaintiff had failed to prove its case as to the unconstitutionality of the statutory provision complained of and also upon the ground that the plaintiff

had not shown itself to have been damaged by such provision. The motions were denied by the Special Master and the defendants excepted.

[fol. 175] IRWIN KOTCHER was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer.

I am the President of Ferndale Farms. I have been in the milk business since 1914, producing and selling both bulk and bottled milk in Brooklyn primarily to stores and restaurants. During that time I have done everything in the milk business practically that there is to be done, from seeing the customer to buying the milk and selling the milk. My firm now sells about 20,000 quarts of milk a day to stores. We have our own bottling plant.

For the last eight or ten years I was Chairman of the Brooklyn dealers, at times I was of Kings and Queens organizations. I was a member of the Milk Conference Board at the time and I was on a number of committees, especially the Conference Committee No. 1 that had to do with the production of milk and prices of milk in the country. My duties in the company now are to meet the dealers and follow up activities. I am a member of the Milk Advisory Board of the State of New York. The Milk Dealers Association to which I referred consisted of a number of independent dealers selling to stores in New York City, the number of such dealers ranging from 15 to as high as 46. [fol. 176] During this period I have been in frequent contact with storekeepers and with representatives of the advertised dealers.

During the last ten years I was acquainted with the prices at which bulk and bottled milk were sold by the advertised dealers and by the independent dealers to stores in New York City. For the last thirteen years, without exception, Ferndale Farms has sold bottled milk 1¢ or more below Borden and Sheffield, and bulk milk from 10¢ to 40¢ per 40-quart can. It has been the practice of the independent dealers, with very few exceptions, to sell bottled milk

to stores 1¢ or more per quart less than Borden and Sheffield, and bulk milk from 10¢ to 40¢ per can. This practice goes back to at least 1914.

Defendants' Exhibit 2 is a record of the prices at which we sold bottled milk to stores in New York City during a period of several years prior to the 1933 Milk Control Law; the prices are given month by month, our own prices and the advertised prices each month.

I sell my milk to about 600 stores. Prior to November, 1931, I sold bottled milk to between 400 and 450 stores. At that time, about 75 or 80, or a little over half of all the dealers, sold bottled milk to stores.

[fol. 177] Prior to the 1933 Milk Control Law, I purchased my milk from approximately 400 New York producers for whom I was the sole outlet. We bought at a price which was sometimes a little higher but never less than the Sheffield classified price—that is, the net price paid by Sheffield Farms to its producers. Our price and the Sheffield price was usually higher over a long period of time than the price received by the members of the Dairymen's League. We now purchase from practically the same producers and are the sole outlet for them.

I don't remember ever trying to sell Grade B bottled milk to stores in New York City at the same price as Borden and Sheffield. Bottled milk of the advertised brands was sold to the same stores to which we were selling bottled milk before the Milk Control Law.

By the Special Master:

I know the price at which advertised brands of bottled milk were sold to stores where we sold bottled milk. I know this because I used to go to these stores time and again, see them about disputes, take them on as new customers, collect bills from them. I learned the price of advertised brands from the drivers and the storekeepers; I have stood [fol. 178] there while they collected; I hired men that worked for Borden and Sheffield. Almost all stores pay cash and I have seen these transactions go through thousands of times. Until the early part of 1932, the larger companies got 1¢ more for their milk than we did. It was my business to know their prices because our price was always gauged 1¢ below for years.

Direct examination.

By Mr. Kramer (continued):

The State of New York did not at any time brand the unadvertised brands of milk as an inferior product; the State did not differentiate between any brands but treated all milk alike.

If the price of unadvertised brands of milk were the same as the advertised, it would result in a decrease in consumption of milk. The immediate decrease would be about 5%, and after about two weeks it would slide down to about 3½%, where it would remain.

Cross-examination.

By Mr. Pfeiffer:

In the statement I have just made, I assumed that the independent dealers would have to sell at the same price as the advertised brands. If the price of milk is put down, the tendency is to increase consumption.

When I said that the State treated all milk alike, I meant [fol. 179] in their advertising campaigns. Except in respect of the differential between advertised and unadvertised brands, the State does treat all milk alike. That is the only exception I can think of.

In saying that I was the sole outlet of the producers from whom I purchased, I did not mean that these producers would not have any outlet for their milk if I went out of business.

Although a majority of the dealers in New York City were selling bottled milk to stores in November 1931, this had been true only since the agitation for the abolition of bulk milk. The number of dealers did not increase materially after November 1931, but the number of dealers selling bottled milk did. I know practically all the dealers in Brooklyn and a great many of them in Manhattan and the Bronx. I know the dealers as well as anyone else in the City. I discuss business and conditions with them for hours and nights.

I now sell bottled milk to over 600 stores. I sold to about 400 stores just before the 1933 Milk Control Law, but since then I have taken over another company and consolidated its business with Ferndale. We have lost about 20% of our

business since the law went into effect and have also lost over 2,000 cases a day that we bottled for other dealers.

[fol. 180] We have a little retail business. We sold retail at the same price as Borden and Sheffield. There were a few other independent dealers who did the same, but the smaller dealers sold 1¢ and 2¢ below us. We have been selling retail at the same price as Borden and Sheffield for a great many years and so have one or two other independent dealers like us but the smaller dealers sold a cent or two below us. Some of the independents are supposed to have a price in effect but they collect all sorts of prices; they have list prices and get what they can.

We always sold bulk milk at 10¢ to 40¢ per can below the Borden price. We tried to get as much as we could, but 98% of the stores were 10¢ to 40¢ below. We might have an exception sometime in some restaurant. Borden was not selling bulk milk in all the stores where we did, but you can't charge one price behind doors and another outside; you have to take the same price all over. I don't know all the prices Borden got but I know a good deal about their prices in the territory we were in. Practically all dealers quoted the same price. As a rule we did not try to get the price. As far as possible we tried to get our price throughout the business. We tried to get as much as we could. I knew of the arrangements Borden and the other dealers [fol. 181] had with stores in our territory. I used to discuss prices with the Borden branch manager. I had no quarrels with Borden. We had the same list price as they did.

Prior to conversion of bulk to bottled milk the business was approximately 40% retail, 25% bulk to stores, 20% bulk to restaurants and 15% bottled to stores. In the wholesale business my figures show about 25% bottled milk and 75% bulk.

Redirect examination.

By Mr. Kramer:

If we were to go out of business I don't know what the producers from whom we purchase would do. They might go to some other locality and sell their milk there, at lower prices perhaps, if they could find a market.

The reason we did not try to sell bottled milk to stores at the same price as the advertised brands was that we

knew that when the larger companies sold at the same price as we did we lost business. What would be the sense of raising the price and losing the business? Every time they came down to our level we were out of the picture.

Prior to the Milk Control Law we sold maybe 2% of our bulk milk at the same price as the advertised brands. The balance of our bulk milk sales ranged on the average about 12¢ to 15¢ below their price.

[fol. 182] Defendants' Exhibit 2 was received in evidence.

By the Special Master:

Prior to the Milk Control Law prices came down quite fast due to surpluses. If the drop would be considered cutting of prices, then there was cutting. We followed the large companies. As they came down, we came down. We never set prices. We just danced as the music was played. Prices were quite variable. That resulted in part from competition; in Brooklyn this came more or less from the larger companies, in our case due to the attempt in the country to take our producers and in the City to press our trade down. We got a special dose of canvassing due to the taking off of the bottle deposit. We continued a bottle deposit of 5¢ and that caused a variance in price. You might consider one price lower in figures, but it was really higher in monetary value. 6½¢ might be a higher price than 8¢ for milk when you charge a 5¢ deposit. Sometimes the price of bottled milk got down as low as bulk milk; it was the dying gasp of bulk milk and the dealers held the price as high as they could:

[fol. 183] Cross-examination.

By Mr. Pfeiffer (continued):

All dealers were not trying to expand their business. Borden, more than anybody else, was trying to expand. Dealers were trying to hold their own as a rule. In the process they had to make price concessions. I would not say it caused price wars. We did not consider ourselves in any war. We just followed the general line down. What Borden and Sheffield did we did. We were just in that range and never considered ours a war with anybody during the period from about May 1932 until the enactment of the

Milk Control Law. I consider a price war a fight between dealers or storekeepers at a price below the prevailing price range at the time. The only price war was in the bottle deposit. You may consider the antics and general behavior of the large dealers at the time a price war. But the general price was low. I am not speaking for the rest of the independent dealers. We watched Borden and Sheffield and disregarded the rest. The independent dealers in Brooklyn got the same price, about 1¢ below the advertised brands. There was no more price-cutting between the independents than at any other time in the flush or spring of the year. The entire sale of milk at the time at the price it was sold might be considered a price war, but I would not so consider it. It was either a grand big war or no war at all.

[fol. 184] By the Special Master:

I gauged our prices in Brooklyn by the prices of the larger companies. If the price was 10¢ in Manhattan and 8¢ in Brooklyn I disregarded the Manhattan price and fixed a price of 7¢ which I considered the stabilized price in Brooklyn. It is a price war when you sell milk for less in Brooklyn than you charge for it in New York.

Cross-examination.

By Mr. Pfeiffer (continued):

In Brooklyn the only price war was between the larger companies and the independent dealers. There was no price-cutting between the independent dealers themselves. There were no wide margins between the prices of the various dealers; there was no room for wide margins. In Brooklyn the top price of the milk of the larger companies was 1¢ less than in Manhattan. Plaintiff's Exhibit 6 was put out by our company in September, 1932.

Plaintiff's Exhibit 6 was received in evidence.

By the Special Master:

Just the usual competition was involved in the price war. The drop in our price from 9¢ in January, 1932 to 6½¢ in December was tied up with the removal of the bottle de-
[fol. 185] posit by Borden and Sheffield. Our price was

6½¢ with a 5¢ bottle deposit, the bottles cost us around 5¢, was higher proportionately, we got more out of it than selling at 8¢ with a plain bottle that went into the ash can. We did not know what it brought us, whether it brought us 8 or 9 or it brought us in that period 6½¢, but we knew we would not run with plain bottles and we felt it was cheaper for us.

Redirect examination.

By Mr. Kramer (continued):

The reference in Plaintiff's Exhibit 6 to wholesale price wars and the wide margins in prices created by these constant conflicts referred to the fact that while the emergency drive was going on in the country there was a concerted effort to take our farmers. We were being canvassed in the City. Our price went down in that period to just about 6½¢, and the margin between retail and wholesale was about 5½¢, where it used to be 1¢, and it was entirely out of line. And as an explanation, Plaintiff's Exhibit 6 was given to the public for consumption in the morning when they got their bottled milk, and in general language, without going into a lot of detail and mentioning names or facts, [fol. 186] we just made a general statement that due to conditions prevailing and so on and so forth, we issued this statement with the milk, and we came down for the first time to 1¢ below the advertised brands on retail milk. Borden and Sheffield dropped the 5¢ bottle deposit a little before that time. This had the same effect as if they dropped the price of milk around 2¢ a quart, close to it. That was the reason we dropped our prices.

Defendants' Exhibits 5, 6, 7 and 8, being photographs taken on February 16, 1935 at certain New York City Health Stations, were received in evidence.

Nathan Sacks was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been in the milk business since 1905. I was with the Harry Sacks Dairy Company until we sold out to Dairy-

men's League in 1930. We sold bulk and bottled milk to stores in New York City and I had charge of sales. After we sold out to Dairymen's League I became manager of Sacks Dairy Company, which was organized by Dairymen's League, and remained in that position about 2½ years. I [fol. 187] was in frequent contact with the so-called independent dealers and occasionally I saw representatives of Borden, Sheffield and Dairymen's League. I also met with storekeepers to whom we sold our milk.

I was acquainted with the prices at which bulk and bottled milk were sold to stores in New York City by the independent and the advertised dealers. There was always a custom or trade practice whereby the independent dealers sold bulk milk between 10¢ and 40¢ per can and bottled milk about 1¢ per quart below the prices charged by the advertised dealers. We gauged our prices by those of the advertised dealers. This custom continued until the enactment of the 1933 Milk Control Law.

After I took over the management of Sacks Dairy Company for Dairymen's League in 1930, I followed for about a year the same practice in respect of prices as when I had the business. Then Dairymen's League asked us to get the advertised price. I felt in my own heart that I might not go through with it. I had full contact with almost every customer I had. So I thought I will go to see the customers myself and not raise them with force, but I told them that in case we cannot get along, perhaps I will get my company later on, because I have seen before that I will lose some [fol. 188] trade, which was so. We lost a lot of trade and I believe we held the price up to the advertised price about six weeks. I lost approximately 30 to 35% of the business. The first week after I raised the price we didn't lose so much but as we went along we lost more. I complained to Dairymen's League. They insisted that we get the full price until we found we lost a lot of business. Then I had to go for instructions to get my business back. It cost us a lot of money to get the business back. I got permission to do it by reducing the price on bottled milk 1¢ a quart and a little more than that on bulk milk since it was harder to get that business back.

Most of the business we lost went to the big companies. Among the small dealers there was a practice to respect

the other fellow's trade. 90% of the independent dealers would not take a customer from each other.

I left the employ of Dairymen's League in December, 1932. Since April, 1933 I have been connected with Eastern Farm Products Company, an independent dealer which now sells about 12,000 quarts of bottled milk to stores in New York City. It buys its milk in New York State.

[fol. 189] Cross-examination.

By Mr. Pfeiffer:

All the business of Harry Sacks Dairy Company was wholesale. About 92% of our sales were bulk milk and 8% bottled, the bottled amounting to about 1,800 quarts a day. We sold to stores all through Brooklyn. I don't know how many stores we sold bottled milk to. Either Borden or Sheffield was in every store but not any other independent dealer.

The independents would not attempt to take the trade of one another. They did not have meetings at which they determined prices they were going to ask and they did not all charge the same price. In my own business I did not charge all the same price. For many years I had the same list price as the larger companies. I don't know about other dealers. I didn't discuss prices with them except occasionally. I was not familiar with the exact prices they charged. Each one had different prices and so did we. As a rule we figured about 30¢ a can. We did not have the same list prices on bottled milk. Everyone had the same list price on bulk milk and it was the universal practice of the independents to sell from 10¢ to 40¢ below the list price. I don't know whether it was the practice of Borden to sell at or below the list price. There was no list price for bottled milk. At times [fol. 190] we used to sell even 2¢ lower than Borden and Sheffield so that we could sell our bulk milk.

By the Special Master:

We sold bottled milk 1 or 2¢ below Borden and Sheffield because we did not have anything to advertise the milk in order to push our bottled milk. We did it in order to keep the trade.

Cross-examination.

By Mr. Pfeiffer (continued):

Occasionally we cut the price of bottled milk to retain or increase our sales of bulk milk. At that time the thing we were interested in was the sale of bulk milk. Most of the stealing of other people's trade was done by the big companies. They were always at liberty to take a customer from anybody and they always did. If a customer wanted to take 10¢ more off of me he did not go to the big company just because it was different. If he got 30¢ off of me less than he got off of Borden or Sheffield naturally that meant a lot to him. But in order to get 10¢ off of me he would call the big company and they would serve him. Then I had to go back and drop the 10¢ in order to hold my business. The customer would use this argument: He would show me a sign in the window and say: "Here, I am [fol. 191] selling Borden's milk. A woman comes in and she wants Borden's milk, and I give it to her. Your milk I have to be a salesman to try to sell it." And he tries to buy his milk as cheap as he can. Borden would get a bigger price than we would. I don't know of Borden coming down on its price in many cases. Stores would always pay Borden more than they would pay us because Borden would put up a sign "Borden's sold here." Our name was not advertised enough so that our sign would mean anything. We didn't do any advertising.

I don't know whether Borden came down or not in the case of the stores to whom we sold. The trouble in stealing customers came from the big companies. They did not have to come down in price. The stores simply used Borden's milk so as to get my price down. The 20¢ or 10¢ difference to some of them did not make any difference. They would rather pay Borden 20¢ more and use Borden's card in the window.

In some stores we were the only dealer selling bulk milk. In others there were 2 or 3 dealers, and perhaps Borden was in there. There was more than one dealer in at least 50% of the stores. These dealers tried to get the best price they could. They did not all charge the same price. Most [fol. 192] of the milk was sold at the same price, but the independent dealers would not try to take the business of another dealer serving the same store.

I don't know of any case in which the big companies reduced their prices but I don't know whether they did or not.

By the Special Master:

Most of the storekeepers would buy a certain part of Borden's milk so that they could carry that sign of Borden's. To take an example, a storekeeper who was a friend of mine took 4 cans from me and about the same from Borden. I tried to get the rest of the business and he said: "If I take less milk of Borden's, naturally they will take the sign off, and it means I will lose my business. I have got to have Borden's sign."

Redirect examination.

By Mr. Kramer:

There were around 50 or more wholesale dealers in Brooklyn in November, 1931. About 40% of them sold bottled milk. Some of them sold a couple of cases, some of them more.

[fol. 193] Louis Pansius was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been in the milk business 19 years. In 1917 I went with Borden and remained with them 4 or 5 years. Then I went to Evans for a year and from there to Sheffield where I stayed until 1927. Then I went into business for myself under the name Fred Beers, Inc.

When I was with Sheffield I was route driver and inspector in the Brownsville section of Brooklyn. This brought me in daily contact with both storekeepers and retail customers. I met with drivers and route collectors of other companies. I was acquainted at the time with the prices generally charged by the independent dealers and by Borden and Sheffield for bulk milk sold to stores. There was a trade custom or practice for the independents always to get less than we got, from 10¢ to 80¢ in some cases.

I am Secretary and Treasurer of Fred Beers and my duties are anything and everything. We began to sell bottled milk to stores one year before bulk milk went out; before that we sold bulk milk, cream and condensed milk. In selling bulk milk we always got 10¢ to 30¢ less than the [fol. 194] prices of the advertised dealers. When we began the sale of bottled milk we got 1¢ less than the prices of the advertised dealers until the time when the bottle deposit was taken off; then we got 2¢ less. Borden and Sheffield took off the bottle deposit.

We sold milk to stores in Brooklyn, Nassau and part of Suffolk. After we began the sale of bottled milk we sold around 100 to 150 cases a day. In 1931 we took over a milk business in Freeport, L. I. We sold about 100 cases of bottled milk through our Freeport branch. We always got a penny or so less in Freeport and we built that business from 100 cases to about 450, and when the Milk Control Law came in we dropped to close on to 100 cases which we are down to now. Before the Milk Control Law we sold bottled milk in Freeport 1¢ or 2¢ below the advertised price; after the Milk Control Law we had to sell at the same price as the advertised dealers.

The custom or practice which I testified existed while I was with Sheffield continued subsequent to 1927 until the enactment of the Milk Control Law. Bottled milk was always sold by the independents 1¢ below the advertised price except when the bottle deposit was taken off; then it was 2¢ below. Bulk milk was sold from 10¢ to 30¢ a [fol. 195] can less.

Cross-examination.

By Mr. Pfeiffer:

Up to the middle of 1932 our company was not in competition with the big companies so far as bottled milk was concerned. Then we started with a few cases and gradually kept on building it up. At the time the Milk Control Law went into effect we were selling around 1,000 cases to a large number of stores. In every one of those stores we were selling at 1¢ less than Borden. We knew the Borden list price, not the actual price, both for bulk and bottled milk.

Redirect examination.

By Mr. Kramer:

The increase in the bottled business of the Beers Company to 1,000 cases represented the conversion from bulk to bottled milk. There was practically no new business.

BENJAMIN VALVO was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a milk dealer for 30 years. I sold bulk and bottled milk from 1905 to 1910, when I sold the bottled [fol. 196] business. I sold bulk milk until 1931 when I started to sell bottled milk again. The name of my firm was Nicosia Brothers. I was in charge of sales. In 1932 we sold our business to Dairymen's League. For six months I stayed with Dairymen's League as Manager of the branch.

Our business was entirely wholesale. Prior to the sale of our business to Dairymen's League I met with storekeepers almost every day and with other dealers occasionally. I was acquainted with the prices at which bulk and bottled milk were sold to stores in New York City by independent and by the advertised dealers. There was a custom or trade practice for the independents to sell bulk milk from 20¢ to 40¢ a can less than the advertised dealers and bottled milk 1¢ a quart less. I followed that practice in my own business. In 1932 when we sold our business to Dairymen's League we were selling 400 cans of bulk milk and about the same amount of bottled milk. Before 1931 we did not sell any bottled milk.

After we sold our business to Dairymen s League I continued the same method I employed before. In a certain period we were instructed to get the advertised price and we tried to get the price, but the consequence was that we lost the business; in a period of a couple of weeks we [fol. 197] lost considerable business and then to reinstate the business we were instructed to go back and try to get

that business again on the same price as before. We tried to get the advertised price for a couple of weeks and when we saw that we lost 20 to 30% of our business we went back to the old price under Borden and Sheffield and got our customers back.

I left the employ of Dairymen's League on October 31, 1932. I then started Lehigh Dairy Company. Until the enactment of the Milk Control Law I sold bottled milk 1¢ below the advertised brands. We sell 600 cases a day. We buy all our milk from New York producers.

Cross-examination.

By Mr. Pfeiffer:

After we sold our business to Dairymen's League we continued to sell under the name of Nicosia Brothers. We did not sell under the name of Dairylea. We were selling to stores in the east side section of Manhattan when we tried to raise the price and lost 20 to 30% of our business. The business was lost partly to independents but mostly to Borden. One independent named Phelp was selling $2 a can less than the price of the other independents. He [fol. 198] was one of the worst dealers I have come across. We were selling 20¢ and 30¢ under Borden. If we were compelled to take 40¢ off we had to take 40¢ less. When I talk of selling below Borden's price I am speaking of the list price Borden and Sheffield had at certain times. I asked Mr. Dougherty at the branch and he said he got the full list price. I never found Borden selling at anything but the list price; they were top price all the time. They were no "gyppers". I was compelled to gyp by Borden. If I lost a customer they would take top price. If I did not come down 20, 30 or 40¢ less he still continues buying from Borden.

By the Special Master:

I had to come down. I met the customer's price all the time.

Cross-examination.

By Mr. Pfeiffer (continued):

After November, 1932 when I was with the Lehigh Company it always sold 20¢ and 30¢ below Borden's price until

the Milk Control Law. If occasion occurred we sometimes sold $1 and $1.50 a can below Borden. A new store opens up and the first crack out of the box he comes out with a sign "Free Milk". I had customers across the way and naturally when they see a new store opened up giving free [fol. 199] milk or selling for 3¢ a quart I had to come down and give them for $1 or $2 or $3 less, or probably give it for nothing. The new store probably got its milk from an independent, probably from Borden, I don't remember. I don't know whether Borden gave milk for nothing but I know that on a lot of occasions it was Borden's milk sold free.

By the Special Master:

It was not a milk war, it was a storekeepers' war. I had to yield plenty to the storekeepers to keep the business.

Cross-examination.

By Mr. Pfeiffer (continued):

All this occurred in the period of conversion from bulk to bottled milk. We were having price wars up and down the neighborhood all the time, especially when a new store opened. That continued for more than a year until the Milk Control Law.

Redirect examination.

By Mr. Kramer:

Prior to November, 1931 we had the same condition whenever a new store would open. There was the same price-cutting during the entire period of the Nicosia business before 1931.

[fol. 200] Charles Henry Curtis Beakes was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have been in the milk business 23 years. I have been connected with Beakes Dairy Company, Beakes River-

dale Farms and The Beakes Creamery Company. These companies engaged from 1929 on in the wholesale distribution of bulk and bottled milk in New York City. Beakes Dairy Company sold chiefly to hotels, restaurants, etc. and also sold to some stores in Manhattan; Beakes Riverdale sold mostly to stores in the Bronx.

I have been personally acquainted with the milk dealers in the industry generally in New York City for many years and am familiar with the customs and practices obtaining for the last 8 or 10 years. To my knowledge from 1929 until the enactment of the Milk Control Law there was no established differential between the prices at which the bulk and bottled milk of independent dealers and of the larger dealers was sold to stores in New York City, nor was there any trade custom or practice whereby all dealers had the same established price. The established price would be known as a price for milk in stores, restaurants [fol. 201] or anywhere it might be sold. Perhaps through competitive conditions in certain areas that price might fluctuate, with a thought of gaining business or taking care of trade where undue competition had arisen, or something of that sort.

Directly after the report of the Loose Milk Commission in November, 1931 competition for the store business in bottled milk became rather keen due to the fact that dealers wanted to be identified with a store as they realized bottled milk would have to replace the bulk milk they were selling. From the spring of 1932 on there was utter chaos in respect of competition among dealers for the business of selling bottled milk to stores.

By the Special Master:

By that I mean prices were all tumbling down and people would be selling for anything to get business. By "chaos" I mean as contrasted with a stabilized market.

Cross-examination.

By Mr. Kramer:

I am now identified with Dairymen's League and have been since 1928. Beakes Dairy Company is a subsidiary of Dairymen's League; it does not now sell any bottled [fol. 202] milk to stores. Beakes Riverdale Farms is now

combined with the Hauk & Schmidt Division of Dairymen's League and sells bottled milk to stores at the unadvertised price.

Prior to the Milk Control Law these two companies sold bulk and bottled milk to stores at the same price as Borden and Sheffield. I have not had access to books or price schedules of other companies so that I cannot name any other dealer who sold at the same price. I cannot tell you the specific prices at which the companies I am connected with sold bottled milk without consulting records.

Competition for the store bottled milk business began after the publication of the Loose Milk Commission report and continued until the enactment of the Milk Control Law. It did not increase month by month. Most of the competition began in the spring of 1932. It was not due to the surplus at that time, but the surplus made available more milk for competition. Borden and Sheffield did not to my knowledge endeavor during this time to secure the business of the stores for the sale of bottled milk. Dairymen's League attempted to get the bottled business of the stores that we had been serving with bulk milk. Our interest was [fol. 203] in retaining our own customers and I believe the effort of Borden and Sheffield was very similar to ours, to protect the outlets which they had. I don't know the percentage of stores served at that time by independent dealers, nor do I know the number of such dealers or the quantity of bulk or bottled milk sold. I doubt that the independent dealers served the majority of the stores with either bulk or bottled milk. My estimate would be about 50%. I believe the independent dealers made strenuous efforts not only to sell bottled milk to their own customers but also to obtain the customers of the larger units. Prior to the Loose Milk Commission report the independents had to a certain extent attempted to secure the business of the larger units; after the report I believe the effort was intensified.

The larger units were established for bottling in large volume. The smaller dealers had small equipment which they were counting on expanding. But primarily their thought was the lower purchase price for milk, for the basic milk, to make up such difference as would permit them to sell at a lower price than the large unit. The independent dealers were not necessarily in a less advantage-

[fol. 204] ous position to compete with the large dealers in the sale of bottled milk than in the sale of bulk milk. Not all of them had bottling facilities but it was known that a certain period would be granted before the ban on bulk milk would be effective. That period was ample for the installation of bottling apparatus which the smaller dealer could do at much less cost than the larger organizations. From conversations with the smaller dealers I would say that they could operate a bottling business at a lesser cost than the large dealers. I don't know it to be a fact since I have not seen their figures, but from the prices at which they were selling milk it must be the fact. I don't know what percentage of independent dealers had bottling facilities at the time of the Loose Milk Commission report. I don't recall the facts relating to the dropping of the bottle deposit.

JACOB BEYER was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a milk dealer since 1906. Until 1932 I produced milk which I sold. I have sold bulk and bottled milk to stores in Brooklyn and lower Manhattan; I have done no advertising of my milk. I have met with other independent [fol. 205] dealers, storekeepers to whom I have sold and representatives of Dairymen's League and Borden. I was acquainted with the prices at which bulk and bottled milk was sold to stores in New York City by independent dealers and by the advertised dealers prior to November, 1931. There was always a custom or trade practice for the independents to sell bulk milk 20¢ a can and bottled milk 1¢ or 2¢ a quart lower than the advertised dealers. This continued up to the enactment of the Milk Control Law. I followed that custom or practice in my own business. For the last 10 or 12 years I have sold 150 cans of bulk milk a day; up to 1931 I sold about 1,200 quarts of bottled milk. I sold to about 150 stores. I and another independent dealer bought practically the total output of Little Falls Dairy Company, Little Falls, N. Y. Prior to the Milk Control

Law I purchased on the Sheffield base plus a handling charge. I am still buying from Little Falls. All of the milk I purchase is used for fluid purposes; that was true in my business prior to the Milk Control Law and I presume it was true with respect to other independent dealers; it was of those that I knew.

I think that almost everyone sold bottled milk to a certain extent to stores in November, 1931. Certain stores [fol. 206] demanded a couple of bottles of milk and if you did not have it you took chances on losing his business on bulk milk. Certain dealers that had no plants had to go out of their way to get it. Almost every truck had a few cases of bottled milk.

I have visited most of the stores supplied by me. Not so many sell the milk of Dairymen's League but Borden or Sheffield is in every one of them, practically better than 99%.

By the Special Master:

A few bottles or a few cases because a customer might ask for Borden's or Sheffields.

Direct examination.

By Mr. Kramer (continued):

The 5¢ bottle deposit was taken off in Manhattan 5 or 6 months prior to the time it was taken off in Brooklyn. Borden took it off first in Manhattan and Borden and Sheffield took it off at the same time in Brooklyn. Then they came out with a 3¢ deposit after that. I don't believe any of the independent dealers ever removed the bottle deposit; I didn't remove or reduce it and that was generally true of the other independents.

[fol. 207] Cross-examination.

By Mr. Pfeiffer:

There was a good deal of confusion in 1932 about changing the business over from bulk to bottled milk. There would be a price war when a new store opened up, or a special on a Saturday. I have been out with Mr. Elsner, of the plaintiff company, more than once straightening out a situation in Brooklyn. I would not say there was any

exceptional competition between dealers in this period of transition. The lowest price I can recall selling bottled milk to stores was 6¢ in Brooklyn and 7¢ in Manhattan except when there was a Saturday weekend business or an opening store. We had the same thing for 20 years; I don't believe there was any difference in this period.

I conferred on several occasions with Mr. Dougherty and Mr. Elsner and Mr. Reinhart, of the plaintiff company, and at times they told me their price was so and so and that they would not go below it and at times they went below it to meet that certain condition.

By the Special Master:

We wanted a stabilized market and if somebody broke in and tried to prevent it by cutting under everybody we tried to stop it. That is what I mean by these tours of [fol. 208] Brooklyn with representatives of other companies.

Redirect examination.

By Mr. Kramer:

From the enactment of the 1933 Milk Control Law until the present time there has been a decline of about 30% in the volume of my bottled milk sales with the same amount of stores.

Max Levy was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a milk dealer for over 20 years. I am now interested in 2 businesses, Sunshine Farms, Inc. and Local Milk Products, Inc. The latter has been in existence since 1923; its business was mainly with restaurants and hotels until the abandonment of bulk milk when the small amount of store business was turned into bottled business. Before 1931 it sold to only 50 or 60 stores. Sunshine Farms started in 1925 and its business has always been entirely

bottled milk. In November, 1931 it sold 1,200 to 1,300 cases daily.

Local Milk Products sold bulk milk to stores in New York City about 10¢ to 50¢ a can less than the advertised dealers [fol. 209] before November, 1931 and subsequently until the enactment of the Milk Control Law. Sunshine Farms sold bottled milk 1¢ a quart less than the advertised dealers during the same period. Since the enactment of the Milk Control Law both companies have been selling bottled milk at the differential.

Both prior to November, 1931 and subsequent thereto until the enactment of the Milk Control Law it was the custom of the independent dealers to sell bulk milk from 10¢ to 50¢ a can and bottled milk 1¢ or more a quart below the advertised dealers. In November, 1931 Sunshine Farms sold bottled milk to 500 or 600 stores.

I have had occasion to visit a good many of the stores to which I have sold bottled milk since the enactment of the Milk Control Law. They all carry advertised brands in addition to mine, but not to any large extent. The advertised brands have a minority, a small part of the business in these stores. The storekeepers sell the advertised brands because there is a demand for them.

Cross-examination.

By Mr. Pfeiffer:

Local Milk Products got as high a price as it could and in a very few cases got the same price as Borden. It met competition all along the line and was in competition with [fol. 210] everybody in the business in the case of both bulk and bottled milk. When I speak of selling for less I am referring to the list price of Borden. I know what Borden got for its milk from information which I received from Borden managers and from customers. Borden never refused to give me any information regarding price. They always told me what they were getting in a store in which we were both selling. I lost costomers to Borden and got customers of theirs, not always by cutting prices. I was in active competition with Borden. We both did the same thing.

Redirect examination.

By Mr. Kramer:

At the time of the enactment of the Milk Control Law, Sunshine Farms was selling 1,200 to 1,300 cases of bottled milk. It now sells about 850 cases.

In conversations with Borden managers I exchanged prices with them. Irrespective of what was done with relation to the stores my prices were usually below Borden's.

Recross-examination.

By Mr. Pfeiffer:

In those cases where the customer switched to Borden my price was not below Borden.

[fol. 211] DAVID HOFFER was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am the Executive Secretary of the Retail Grocers' Federation having a membership of 2,400 in New York City. All the members sell bottled milk.

From 1932 up to 6 months ago I had a grocery store in Brooklyn. From 1929 to 1931 I had a store in the Bronx and from 1927 to 1929 I had one on the east side of Manhattan. I have been a grocer since 1917. I carried the bottled milk of Borden's and Dairymen's League in the east side store in the beginning and later only Dairymen's League. The bottled milk of Dairymen's League was usually cheaper with 1¢ or something like that than Borden's. I bought bulk milk from an independent dealer. In the Bronx store I handled the bulk milk of an independent dealer and Borden's bottled milk. In the Brooklyn store when I bought it Borden was serving both bulk and bottled milk. I took in an independent dealer named Queens on bottled milk and kept Borden.

I have been Secretary of the Federation since 1929 and before that I held smaller offices. During the past 10 years I have been in frequent contact with independent dealers [fol. 212] and every day with storekeepers. Until the enactment of the Milk Control Law there was a trade practice or custom for the independent dealers to sell bulk milk between 10¢ and 60¢ or better below the advertised dealers. It was according to how good the grocer was in getting the price. The independents sold bottled milk a cent or two lower than the advertised brands.

The only experiences I had with consumers with respect to the sale of advertised brands and the independents' milk was when there was a fight between the independents and Borden and Borden used to give advertisements in the newspapers that ridiculed other milks, and customers made mention of that. I had conversations with customers at that time.

I never sold independent milk at the same price as I sold Borden's.

I am indirectly in frequent contact with consumers who buy from stores. When I come into the stores customers are there and I hear what they talk. I visit about 40 stores a day. In my opinion stores would be unable to sell independent milk to customers at the same price as the advertised brands.

[fol. 213] By the Special Master:

I never tried to sell any unadvertised bottled milk at the same price as advertised milk. Some of my members did and they could not sell it for the same price.

Cross-examination.

By Mr. Pfeiffer:

We could not sell the non-advertised for the same price. No reason for the woman to take it. A woman will come into my store and I will ask 10¢ a bottle of milk, any kind. Why should she take Johnson's she never heard about? "Why, give me Borden's." I would not say that I could not sell a single bottle of unadvertised milk.

There are some people who insist on Borden's milk. If all milk was sold at the same price the storekeeper would probably not lose any business. The storekeepers are in-

terested in maintaining the differential for their customers. We are interested in keeping the store price below the retail price and the greater the differential the more we are satisfied. We are interested in the differential because if all milk were to be sold at the same price there would be only 1¢ difference between store and retail prices. I am interested in the differential in order to keep the milk in my members' stores.

[fol. 214] Redirect examination.

By Mr. Kramer:

The differential is passed along by the storekeeper to the consumer. The storekeeper cannot keep any part of it because he sells for 1¢ less.

CHARLES HENRY CURTIS BEAKES was recalled as a witness on behalf of the plaintiff and testified as follows:

Cross-examination.

By Mr. Manley:

I am employed by Dairymen's League in the capacity of President of Beakes Dairy Company. I was employed in that same capacity from October, 1932 to April, 1933 and usually sat in at the monthly conferences of branch managers of Dairymen's League during that period. The prices of Dairymen's League and its subsidiaries and competitors were discussed along with other operating problems. Beakes Dairy Company and Beakes Riverdale were selling to stores in Manhattan and the Bronx at that time in competition with Borden. I could not give the Beakes or Borden prices during any of that period without a record. Beakes salesmen and managers had instructions as to the sales prices they were to collect from prospective customers and Borden must have had a similar practice. We would [fol. 215] get knowledge from the street as to the price Borden was collecting; it was our branch manager's job to know what was going on in his territory. The Beakes price was fixed at that time on the basis of the 1¢ price differential, it was fixed 1¢ under the Borden price.

Redirect examination.

By Mr. Pfeiffer:

I am speaking of the 1¢ differential under the statute. Beakes was an unadvertised brand.

Cross-examination.

By Mr. Manley (continued):

To the best of my knowledge that was true also of the last three months of 1932 and the first three months of 1933. The Beakes price was maintained 1¢ under the Borden price at that time.

By the Special Master:

That was before milk control.

Redirect examination.

By Mr. Pfeiffer (continued):

In the testimony I just gave I am sorry I misplaced the period. There was not a differential of 1¢ for Beakes at that period. I had assumed—I have not these dates too well fixed in my mind—that the date was after the establishment of the differential by the Milk Control Law. [fol. 216] Dairymen's League was in active competition with Borden in this period of six months prior to the enactment of the law.

By the Special Master:

From 1929 on until the Milk Control Law came in we discussed matters of price at the conferences of branch managers of Dairymen's League. During that period I would say that between 90 and 95% of Beakes milk was sold at the same price as the advertised brands. This is quite the contrary of what I stated in answer to Mr. Manley's question. I am sorry, I did not understand Mr. Manley's question at the time.

Recross-examination.

By Mr. Manley:

From October, 1932 to April, 1933 Beakes Dairy Company was selling only Dairylea bottled milk; it did not sell

[fol. 217] any under the name of Beakes. I am unable to state at what price sales were made by Beakes; I could find them from our records. I don't know at what prices Borden sold; I am not sufficiently familiar with them. To a great extent Beakes sold all its milk at the same price; there would be a very small competitive diversion from the uniform price. There was a specific price which the salesman quoted to prospective customers. Beakes Riverdale always sold on a uniform price except where due to a local competitive condition there would perhaps be some necessary concession to maintain an outlet. The percentage of milk on which such concessions were made was relatively very small.

Recross-examination.

By Mr. Kramer:

Beakes Riverdale began to sell under the Dairylea brand directly after the sale of Beakes Riverdale to Dairymen's League in 1931. From then on it sold bottled milk under the Dairylea brand. There was little fluctuation in the price of Beakes milk in 1931 and 1930.

Redirect examination.

By Mr. Pfeiffer (continued):

In cases where customers declined to continue buying from us unless we cut the price we did cut the price if the customer was worth keeping.

[fol. 218] Adolphus C. Pilger was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have my own farm at Elba, N. Y. I have 42 head of cattle producing an average of 200 quarts of milk a day. I have been a farmer since 1929. I am Secretary of Coneseus Milk Producers Association which has 720 members. Their average production is 100 quarts a day, but it fluc-

tuates with the season. I am also President of Genesee County Milk Producers Association which has 140 members. I am also President of The Mutual Dairy Co-operative, Inc., which is an amalgamation of independent co-operatives to bring about united action. We now have 10 co-operatives in the Mutual representing approximately 3,000 farmers.

I place the total number of farmers in New York State at 90,000; there are roughly 30,000 in Dairymen's League, 15,000 in Sheffield Producers Association and 45,000 in independent co-operatives or unattached. I and the members of my co-operatives sell our milk to independent dealers in New York City. I am acquainted with the outlet of the other independent farmers. The 30 odd independent co-operatives, including those in the Mutual, sent the bulk [fol. 219] of their milk to the Metropolitan section. The unattached farmers' milk is absorbed in the nearest centers of population. I place the number of independent farmers in independent cooperatives who sell their milk to independent dealers in New York City at approximately 12,000; I would say there are an additional 20,000 farmers not members of cooperatives who ship to independent Metropolitan dealers.

Prior to the Milk Control Law we did not have independent cooperatives. At that time I was selling to Dairymen's League and I know I was selling substantially lower than neighboring independent farmers who were not selling to the League. They were selling to various independent dealers and getting from 40¢ to 80¢ a hundred more than I was. Their price was very closely on a par with the generally recognized Sheffield price which was higher than the Dairymen's League price. The independent farmer might get a cent or 2 lower and the next month a cent or 2 higher than a member of the Sheffield Producers Association, but the independent farmers followed very closely the Sheffield price.

The average classification of the milk sold to independent dealers in New York City by the members of the cooperatives which I represent is at the present time 75% Class 1 and Class 2-A, and the balance in the lower brackets. The prices for milk in the lower brackets are substantially [fol. 220] lower than those for milk in Classes 1 and 2-A. At the present time the Class 1 price is more than twice as much as some of the lower brackets.

I testified at the hearing in March, 1934, before the Joint Committee on Agriculture prior to the passage of the 1934 Milk Control Law and urged the inclusion of the differential provision in the 1934 Law. I appeared in behalf of the industry primarily as farmers, we as farmers taking the whole industry into consideration.

By the Special Master:

I am very seriously in favor of the differential as a farmer because we are primarily concerned in maintaining a market at which we can afford to produce our milk; and it is our reasoning that if the differential is vacated, we will be deprived of the market we now enjoy and have to find the nearest cheese factory for our milk at half what we are getting for it now, and we are hard up enough as it is without getting any less.

Cross-examination.

By Mr. Pfeiffer:

If under the law all milk could be sold in stores at the same price at which unadvertised milk is now sold it would do harm to the co-operatives that I represent. There would be less milk produced in New York State. There [fol. 221] would not be less milk sold, but less of our milk would be sold. It would not cut down production of those farmers that supply Borden through the Dairymen's League. I don't think they could supply all the milk market in New York City but I know the League has continuously insisted that more than half of their volume was surplus and they could immediately turn that into fluid channels and we independents would be holding the bag with all our fluid milk and putting it into cheese.

The independent dealers have paid the Milk Control Law prices for the milk purchased from Coneseus since the law has been in effect. I would not say the independent dealers have in all instances paid the Milk Control Law prices but I am not qualified to tell you what other independent dealers pay their respective co-operatives. I testified before the Legislative Committee in 1934 that at that time there was a short period when our co-operative was in effect receiving, delivering less money to the farmer than the Control Board price; that it was evading the fixed price.

There have been several new co-operatives formed in New York selling to independent dealers in New York City since the Milk Control Law went into effect.

[fol. 222] Redirect examination.

By Mr. Kramer:

If you take the independent farmers and deprive them of their fluid market and drive them all into cheese, with the present misery they are laboring under and the general difficulties during this period you will just have another one of those cases of hell let loose, and nobody can tell where we would wind up. What are you going to do with 32,000 farmers without a market? Set up there and take it nice and easy? We all went through that. We fought and bled for a law to begin with.

By the Special Master:

Based upon my contact with stores, particularly in Brooklyn, I am satisfied in my own mind that if the independent dealer were obliged to sell his milk to stores at the same price as the advertised brands that in about a week he would be up and say: "We cannot use all this milk in fluid. It has got to go into cheese." And we would say: "Why?" "Well, because of the advertising that Borden has over the past decade, we cannot take our unknown milk and sell it at the same price." That is our opinion. We may be wrong; maybe they would demand the unknown milk. Our sole reason for preferring the differential is that it insures us a better market; the sole reason is to maintain our share of the fluid market. We could not continue in [fol. 223] business making butter and cheese; that is all right for Wisconsin or Australia; we cannot do it under our hygienic regulations. We have to do it under too expensive circumstances, and if we remove this differential, you will drive us into those lower brackets in competition with the butter and cheese market which produces its product under much more economical conditions than we can. We are also naturally interested in seeing the consumer get his milk as cheaply as he can; the cheaper he gets it the more we can dispose of in fluid form.

NATHAN E. LAZARUS was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been in the milk business 22 years. I started in New York City as Assistant to the President of an independent company known as McDermott Dairy Company. Around the war time I was connected with the first President of the New York Milk Conference Board, Mr. Shednick. Then I went to Buffalo and was an officer of Queens City Dairy Company until 1920. Since then I have been in business for myself in Buffalo under the name of Lacteal Laboratories, Inc. We are consultants to the industry. We act as consultants to independent cooperatives and independent milk dealers not only in New York but through-
[fol. 224] out the country. My work brings me in frequent contact with independent dealers in New York City.

When I was with the McDermott Company from 1914 to 1917 its business was retail and wholesale in bottled as
[fol. 225] well as bulk milk. I was acquainted with the prices that the independent dealers and the advertised dealers generally charged. There was a trade custom or practice for a difference in prices.

By the Special Master:

It was usually 1¢ to 2¢ lower on bottled milk and 10¢ to 30¢ on bulk milk. There were not very many dealers then. Borden, Sheffield, Empire State Dairy and our own company were the principal ones. There were about 25 or 30 altogether.

Direct examination.

By Mr. Kramer (continued):

The McDermott Company, which sold about 25,000 quarts a day in bottles, sold at those prices with reference to the prices of the advertised dealers.

Since I have been consultant to farmers and dealers I have had occasion to become acquainted with the prices charged by independent and by advertised dealers for bulk and bottled milk in New York City. The prices of the in-

dependents generally have been 1¢ or 1½¢ or 2¢ lower on bottled milk and between 10¢ and 50¢ on bulk milk. That practice existed prior to November, 1931, and subsequent thereto up to the enactment of the Milk Control Law. [fol. 226] Independent dealers in New York City are the outlet for about 80% of the milk of the farmers comprising the co-operatives to which I act as consultant.

I was present at the hearing before the Joint Legislative Committee prior to the enactment of the 1933 Milk Control Law. I did not give any testimony but I assembled the data and statistics for an attorney of our organization, Mr. Cook, who did testify. Mr. Irwin Kotcher at that time gave most of the testimony. I attended the hearing in behalf of the independent farmers. At that time it was an organization comprising 20,000 to 25,000 independent farmers, known as the New York State Milk Producers Association.

By the Special Master:

I was not an officer of that Association; I was consultant to it. I was not paid by them; I volunteered, asked to work with them as consultant. I organized the Association for them. I am thoroughly familiar with the milk business and am a consultant in all matters relating to milk in New York and in other parts of the United States. I believe that a differential is essential for the reason that people in the lower part of New York City, in the congested district, if they did not have a differential would be asked to [fol. 227] pay the same price as people on Fifth Avenue. Since bulk milk has been eliminated any difference in price to those poor people would be very effective. Furthermore, I know from past experience in a number of years that the price has always been lower for the unadvertised dealers and that they cannot compete on the same basis with the large companies. From my experience that difference has been from 1¢ to 2¢, years back and recently too. I also believe that as far as the farmers are concerned, judging from past experiences, where independent sources of supply have been taken over by Dairymen's League or Borden, the independent farmers had to go to cheese factories or other lower forms in order to get rid of their milk. I think the differential is an advantage to both the independent dealer and the farmer.

Cross-examination.

By Mr. Pfeiffer:

I have been asked by the New York State Department of Agriculture and by the Governor to organize the independent farmers in co-operatives. I was not asked by them to favor the differential. I was not in favor of the abolition of bulk milk in New York City.

[fol. 228] I am familiar with the Milk Control Laws of other States. To my knowledge no other State has a provision for a differential between advertised and unadvertised brands.

Mr. Kramer objected to the introduction of this testimony on the ground that it was irrelevant unless the conditions in the other States were shown to be comparable to those in New York and on the further ground that the testimony had already once been ruled out as irrelevant. The objection was overruled. Mr. Kramer moved to have the answer stricken from the record and the motion was denied. Mr. Kramer excepted to both rulings.

Cross-examination.

By Mr. Pfeiffer (continued):

A very small percentage of the independent dealers in New York City have any facilities for manufacturing milk. Practically all the milk used by them goes into fluid milk. A proportion of the milk of farmers selling to Dairymen's [fol. 229] League goes to cheese factories; a far less proportion of the milk of independent farmers goes to cheese factories; but the independent farmers can't ship all of their milk; if they cannot ship all of their milk they have got to take care of the balance of that milk in surplus. The farmers always carried the burden of the surplus.

Prior to the Milk Control Law the farmers of Dairymen's League were paid on the blended price for the use of all the milk which they sold. So were the other farmers paid on a blended price, whatever the proportion might be. The blended price is higher than the price of milk used for manufacturing purposes. The independent farmer was getting a higher price than the Dairymen's League farmer. Whether or not the independent farmer was bearing his

[fol. 230] proportion of surplus depends on what you mean by "proportion of the surplus." He was carrying his entire surplus on his shoulders, whatever that surplus might be. There was always a 20% surplus.

From 1929 to 1933 there was a difference of approximately 1¢ between the prices of Borden and of the independent dealers for bottled milk. The source of my information is my own personal knowledge in going around the stores and contacts with the business. At different times I made investigations personally of the prices at which this milk was being sold in order to get the information back to the farmers as to what was going on in New York City. At that time the State itself was making investigations through the New York City Department of Health as to the differences in prices of milk sold in stores. Whenever I came down to New York, which was on the average of 2 or 3 times a month, I would make it my business to check up around the City. I found in all instances that Borden's bottled milk was being sold in stores sometimes 1¢, sometimes 2¢, but on the average about 1¢ higher than the bottled milk of independent dealers. There might have [fol. 231] been 1 or 2 of the larger independents that sold at the same price, possibly concerns of the type of Waddington Condensed Milk Company or one of its subsidiaries. I won't say that was the only case; I can't recall definitely every case. But on the general average I found that the independents sold 1¢ under the price of Borden and Sheffield.

I made these investigations both prior to and after the Legislative hearing in 1933. I knew that prices then were fixed by the Milk Control Board, but at the same time there was a lot of chiseling going on—cutting of prices of milk. The State itself in its attempt to administer the law found that there was a lot of chiseling and had the storekeepers licensed under the 1934 law, evidently with the object of trying to control that condition. I am speaking of prices charged by storekeepers to customers. I couldn't tell whether there was chiseling on prices paid by storekeepers to independent dealers because I couldn't get any records of what the independents charged the storekeeper. The only information that I could get was from the slips the storekeepers got from the dealers, and they were all based on the regular prices. I didn't go and ask the independent

dealers to let me examine their books. That was not my province.

[fol. 232] I knew of the prices the independent dealers were paying the independent farmers who made up my organization. As far as I know these farmers always received the Milk Control Law prices. There might have been some exceptions but I don't know of any. The basis of my knowledge is what the farmers told me; I didn't make any special investigation of the operation of the statute in that respect. The investigation I made in New York City after the Milk Control Law at the request of the farmers was not to see if they were being chiseled; we wanted to know what the conditions were and know how we were going to work our market.

Redirect examination.

By Mr. Kramer:

In connection with their request that I work toward organizing farmer co-operatives the Governor and the Department of Agriculture did not voice any objection to the differential.

Recross-examination.

By Mr. Pfeiffer:

The question was not raised by the Governor or the Department.

[fol. 233] HARRY CHAYEFSKY was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been in the milk business since 1912. I acquired the business of Morrisania Stock Farms in 1921; its business was entirely bottled milk, wholesale and retail. It sold about 200 cases a day to stores. When I bought the business the price of bottled milk to stores and retail was 1¢ below Borden and Sheffield. It just happened that I bought it during a strike and I was lucky enough at that

time to straighten out the price and I went up to Borden and Sheffield as far as the retail was concerned. But the wholesale I gradually within about a couple of years did the same thing, that is, I sold at the same price as Borden and Sheffield, and I lost out and I did not have any wholesale at all in 1927. Then I came down with 1¢ and I began to go up, until 1931 between Morrisania Stock Farms and Morrisania Dairy I had about 450 cases. Now I understand they have 1,000 or 1,200. I sold out Morrisania in 1931. From 1927 to 1931 Morrisania sold bottled milk wholesale at 1¢ below the advertised price. It served about 250 stores. The practice or custom of the independent deal- [fol. 234] ers was to sell about 1¢ less than the advertised dealers on bottled milk.

Cross-examination.

By Mr. Pfeiffer:

Between 1927 and 1931 I never sold any bottled milk to stores at the same price as Borden's. I am talking about Borden's list prices. I never knew until I was here last week at the hearing that Borden undersold their milk. I never heard that before.

Redirect examination.

By Mr. Kramer:

I did not know of any cases where Borden sold bottled milk to stores below its list price from 1927 to 1931. I knew Borden's list prices and that was actual prices to me.

It was stipulated by counsel for the respective parties that 24 specified independent dealers who had been selling milk to stores in New York City for 5 years or more would, if called by the defendants as witnesses, give testimony to the same general effect as the testimony given by the independent dealers already called on behalf of the defendants.

[fol. 235] HERMAN LEVINE was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am the Manager of United Grocers' and Dairymen's Association which has a membership of 350 grocers and dairymen in the Crown Heights and Flatbush sections of Brooklyn. I devote all my time to this position and am [fol. 236] in daily contact with grocers. I visit between 20 and 25 stores a day on the average. During such visits I generally meet with customers at the stores.

In 1929 and 1930 I conducted a grocery store in the Brownsville section. I sold advertised and non-advertised brands of milk. There was a difference between 20¢ and 50¢ at all times on all milks. I used to buy Ferndale and Sheffield and the difference was between 1 and 1½¢ on bottled and 20¢ to 50¢ on bulk. The same differential between advertised and unadvertised milk prevailed throughout Brooklyn and throughout the organization I represent.

The storekeepers whom I represent now carry advertised and unadvertised brands. They carry in a smaller proportion the advertised brands, in a larger proportion the unadvertised in our stores, and the reason you know.

When I had a store I did not at any time sell independent milk at the same price as the advertised brands.

The reason why storekeepers carry any part of the advertised bottled milk is because the demand is for it. If the differential were eliminated it would make no particle [fol. 237] of difference to us, but the consumption would be so much smaller of the independent milk. Since it is so well advertised, if they get the same price, then why should they buy the independent? That is understood.

Cross-examination.

By Mr. Pfeiffer:

At first when I came into my store I sold Borden's milk for about 2 or 3 weeks, and then I took in Sheffield instead. I know the price at which Borden sold its milk; I came in contact with 30 grocers a day and with 350 at weekly meetings. They tell me the price they pay for Borden's. They

tell me true, and I know it, and whoever chisels I know too. Chiseling goes on all the time, there is no 100%, none is 100%, no business.

I was familiar with conditions in the Crown Heights section in 1932; prices were not stabilized; at times we bought Sheffield's milk for 7¢ and the independents' for 5 and 4 and 3. Sheffield is always higher 2 and 3¢. They would never go down quite so far as these other fellows. The advertised brands did not stand aside in these price wars and let their customers go to the independents. Sheffield [fol. 238] had a price of 11 and 12 and 14¢ and then we bought Sheffield's milk at 7¢ when the independents sold at 5 and 6¢. They had to come down, otherwise they would have lost out. But since the Milk Control Law came in force, they stabilized at least 90%, we stabilized too. All the independents came down to 5 and 6¢ when Sheffield came down to 7¢. Sheffield did not lose all the business on account of their strong advertisements "You can wash vegetables but you can't wash milk" and that had a great effect on the people. They advertised the inferiority of other milk. Of course, it makes an effect and that is what kept them up. The advertised brands as Borden's put out these advertisements all the time and consequently it had an effect. Borden helped out Sheffield automatically with their advertisements, because both of them are equally advertised. I would not vouch for it helping Dairylea milk; it helped Renken a little too since it is known as a branch of a big company—I don't know what company, but Renken holds its own all the time with Borden and Sheffield.

There is a smaller proportion of Borden's milk in stores than of independent milk. In our stores there is always smaller consumption of advertised brands. This was true [fol. 239] in 1929, but I do not speak about bottles then. In 1929 I sold 1 case of bottled milk and 3 cans of bulk, and every storekeeper did the same. I am speaking of milk in general; to me milk is a general thing. Before the Milk Control Law in selling bulk milk from the store to the consumer when everything was at peace there was a standard price. We sold at 8¢ or 9¢ a quart but very, very little was peace. Every Thursday and Friday was another war. When I felt like it I went out with 3¢ a quart, when I had a bad dream, and everybody had to follow me. In peace all

bulk milk was sold by the grocer to the consumer at the same price, Borden's, Sheffield's and independents'. In selling there was no differential but in buying there was a differential. The storekeeper made more money in buying from the independent dealer; he played one dealer off against the other to buy as cheaply as he could; that was up to his luck or cleverness in chiseling business, as they call it today.

Redirect examination.

By Mr. Kramer:

There was no difference in the sale to the consumer of bulk milk. In bottled milk all the time there was a difference of 1¢ and 1½¢ between the advertised and the unadvertised.

[fol. 240] Recross-examination.

By Mr. Pfeiffer:

I do not find any chiseling on the part of Borden now. In 1929 and 1930 there was a free market. We did not call at that time chiseling. The competition was between everybody.

JOHN BRICK was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am employed as a wholesale route salesman by Ferndale Farms. From 1925 to 1931 I was employed by Borden as a retail and wholesale route salesman in the Brownsville [fol. 241] section of Brooklyn. I served retail and wholesale customers with bulk and bottled milk and collected for same. On my route Whitehouse and Sacks were selling to stores at which I delivered Borden's milk. I met frequently with drivers and collectors of the other companies. There was a spread of 1¢ on bottled milk between their prices and Borden's and from 10¢ to 30¢ per can on bulk milk. Dur-

ing my meetings with the various drivers and collectors of the other companies I did not discuss personally with them prices at which they sold their milk to stores, but prices were discussed. Prices for Borden's milk were standard. If there were any changes in prices we were notified that effective such a date and continuing until further notice milk to be sold at that price. When I collected from the storekeeper I received the standard Borden price. I did not receive any lesser price. That practice was always followed by me.

Cross-examination.

By Mr. Pfeiffer:

I don't know whether the branch manager had made arrangements with the storekeeper respecting the price at which bulk or bottled milk was sold to the particular storekeeper. I have no knowledge as to any special arrange-
[fol. 242] ments; all that I did was to collect the list price and that's all I know.

From 1931 to 1933 I was with Ferndale. During all that period there was just a 1¢ spread between Borden's bottled milk and the bottled milk of all the independents. On my route there was no milk being sold at 3, 4 and 5¢ a quart; there might have been in other parts of Brooklyn. There was no price war on my route. The storekeepers always wanted to try to get the milk less than 1¢ cheaper but I invariably kept it at only 1¢. I was able to hold the business at my stores. No other dealer came in and offered to sell at a less price.

Redirect examination.

By Mr. Kramer:

When the bottle deposit came off the difference in price between the advertised and non-advertised brands was 1¢ to 2¢.

JOSEPH P. KELLEY was called as a witness on behalf of the defendants and testified as follows:

Direct examination:

By Mr. Kramer:

I am a resident of the Henry Street Settlement. For the last year I have been advising Miss Hall, the head worker [fol. 243] of the Settlement, in her capacity as a member of the Milk Advisory Committee in Albany. I am the editor of the Co-operative Journal and the Consumers' Defender. At Miss Hall's request I directed the compilation of certain data with respect to the consumption of milk by poor families in New York City. The survey was made from May to August, 1934 and covered 21,559 families all over the City. A questionnaire was distributed principally through school children to their parents and the returns tabulated and summarized under my supervision. Defendants' Exhibit 9 is the summary of that work and shows that the families in the $5-$10 a week income group, of which over 13% of the families covered in this survey belonged, spent over 16% of their income for milk. In the next group of $11-$15 a week income, more than 27% of the families belonged in that group and they spent almost 10% of their income for milk a week, so that we have a direct proportion there between the amount of income and the amount of milk consumed, which led us to the conclusion that as the income increased the milk consumption increased, and inversely, as the price of milk increased, the consumption of milk decreased.

Defendants' Exhibit 9 was received in evidence.

[fol. 244] Defendants' Exhibits 10 and 11 are charts which reflect the results of this summary and are an attempt to summarize in a popular form the findings of the summary. They are merely a visual demonstration.

Defendants' Exhibits 10 and 11 were received in evidence.

A record as to the percentage of the various groups that bought from stores and from wagons (Defendants' Exhibit 13) is being compiled.

GEORGE N. ALLEN was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Lockwood:

I was brought up on a farm in Southern Washington County, N. Y. After I went to school I worked for the Animal Husbandry Department of Cornell University. After that I had charge of an estate in the south where we produced certified milk. During all that time and afterward we owned and operated our farm where we kept from 80 to 100 dairy cattle. In 1932 I was elected Executive Secretary of the Emergency Milk Committee which was a [fol. 245] group of farmers gotten together through mass meetings to try to do something about prices for milk in New York State and was quite active until the time the Milk Control Law went into effect in trying to help the producer end of the dairy business. During that experience I came in contact with practically all the major groups of producers in the Milk Shed, attended a good many of their meetings and heard a good many of their problems, consulted with them about means of trying to correct the low price situation. Later, in the fall of 1932, the Committee along with some other farmers made quite an extensive study of the market conditions in New York City. Early in September, 1932 an announcement was made at a meeting in Syracuse that there was going to be an attempt in New York City to stabilize, if possible, the market and of course the Committee was very much interested in that movement because the prices to producers had been very low, prospects did not look as if they would be much better, and the Committee came to New York to observe just what took place. We found that there was quite a determined effort on the part of some of the dealers to try to hold their prices on an even keel and that there were a number that seemed to be willing and did cut prices. In [fol. 246] other words, they apparently were using cheap milk to bring down the price structure. Where we found that this milk was being offered for cheap prices we pleaded in many instances with the dealers to stop the price-cutting tactics and go along and try to stabilize the market, with the idea that the producers might have a bet-

ter return for their milk, and in many cases we got co-operation. Dealers complained on each other, and in that way we made a pretty complete check-up as to where and who was cutting prices.

We found out that there was price-cutting by purchasing milk at stores. We bought it substantially below the prices at which stabilization was attempted; there was quite a variation, different prices. The lowest price that we had was 3¢ a quart. Earlier in our stay in New York I would say there were between 10 and 12% of the smaller dealers that were cutting prices. Later, after the market became more demoralized there was a larger percentage, 15 to 20. The larger dealers seemed to have a fixed price and were endeavoring to stabilize the market along with the activities of the Emergency Committee. They co-operated with us when we were trying to do what we could to prevent a further demoralization of the market. The attempt suc- [fol. 247] ceeded temporarily only. At the start we had a good many farmers in the City and the dealers seemed anxious to do away with this price-cutting, and they co-operated with us. But there seemed to be always a few somewhere that were anxious to get business on a price-cutting basis, and it was those few that kept breaking down the market. It was the price-cutting by some of the smaller independent dealers that finally broke the prices to a point where there seemed to be no price level. It got to a point where we had no further effect.

I appeared before the Pitcher Committee. I did not give any testimony on the provision for the one cent price differential. I didn't know anything about it.

Cross-examination.

By Mr. Kramer:

The Emergency Committee adopted a provisional contract which was a medium through which the producers in the Milk Shed could become affiliated in one marketing organization. The final choice was Dairymen's League. We had approximately 60,000 producers either under contract to sell the milk through an organization or on a provisional contract, and that was not a sufficient number to make our general plan operative. Later, early in September, our efforts in New York City were more along the line

[fol. 248] of determining exactly how the market conditions were and trying to assist if we could in stabilizing this market and see if we could in some way eliminate this terrific price-cutting which, in the final analysis, is handed back to the producer.

The program of the Emergency Committee was an educational one, to point out the reasons for this low price situation, and it was a movement to bring facts from the best authorities we had to the producers, facts that they could rely on. It was endorsed by practically all of the outstanding farmer organizations within the Milk Shed and by the Federal Farm Board.

We had our first meeting with dealers in New York City in September 1932. We were in touch with a great many; I don't recall all the names but we have an office record of whom we talked to. There were between 75 and 80 dealers who sold milk to stores at that time. I imagine we talked to half of them. The dealers whose names I can recall did not sell at the same price as Borden and Sheffield; their prices varied anywhere from 5¢ up to 7¢ and there seemed to be different prices in different localities in the Metropolitan area. So far as I could observe and our experience goes there was no established difference [fol. 249] between the price charged by these dealers and the price charged by Borden and Sheffield to stores. We bought Eisenberg milk for 4¢ a quart; Sacks milk for 7¢ and Cohen milk for 6¢. The Borden and Sheffield price, as I recall it, was 7¢ and 8¢. One dealer that I recall sold milk at the same price as Borden and Sheffield was Dellwood Dairies. There were some others but I don't recall their names. We were in touch with Mr. Kotcher and Mr. Beyer and Mr. Pansius but I can't tell you offhand the prices at which they sold. Starting in September 1932 we had meetings with dealers almost constantly for a time; we did not do much after December.

The Emergency Committee held a number of meetings which independent producers attended along with all milk producers. A great many of those independent producers sold their milk to independent dealers in New York City. There are about 40,000 to 50,000 Dairymen's League members, 15,000 Sheffield Producers Association members and 25,000 independent producers. I have no accurate figures but I would say the major portion of the milk of inde-

pendent producers was used in the Metropolitan area or New York City. The primary purpose of our meetings was [fol. 250] to induce the independent producers to join one marketing organization which was Dairymen's League. In some sections of the Milk Shed the independent farmer who sold to the independent dealer in New York City received the same or a greater price than the member of Dairymen's League, in some sections he did not. There were not any uniform prices in those days; there seemed to be a great variation. As a general rule the independent dealer paid to the independent farmer as much or more than the member of Dairymen's League received for his milk.

Cross-examination.

By Mr. Manley:

The Emergency Committee made a report at Syracuse on September 2, 1932. A written synopsis of its activities was read by me to the Pitcher Committee at a hearing on January 9, 1933.

So far as we observed Borden was charging uniform prices all over New York City. As I recall it, the price was 8¢. We bought Dairylea milk and found that it was sold at the same price as Borden's. We bought some Sacks milk in Brooklyn for 1¢ less. Sheffield's milk was sold at the same price as Borden's and in most cases Renken; I think some Renken milk was purchased in Brooklyn for a little less.

I am a member of Dairymen's League and was at that time.

[fol. 251] Redirect examination.

By Mr. Pfeiffer:

After refreshing my recollection from our records I can recall 6 additional independent dealers who were selling at the same price as Borden and Sheffield in the fall of 1932. We were principally engaged in looking for milk that was sold at cut-prices.

From the point of view of the farmer I can see no advantage in the differential between advertised and unadvertised brands and I can see a good deal of disadvantage. The

maintenance of a two-price system for milk that is produced under the same sanitary precautions and paid for according to law at the same price to the producer seems to me uneconomical and rather unsound, and it is a thing that I am sure must be difficult to have accurately reported and must be difficult to enforce; and if we could eliminate that situation so that we could get a more accurate reporting on classifications, I believe that all producers would enjoy a little better market for their milk. I mean by that that the producer could get a little higher price for his milk if we had the one price rather than the two. It also seems to me in the up-state markets where they do not have the two-price system that the market has been more stable. In the matter of the organized producers which are carrying a [fol. 252] larger percentage of the surplus milk than the independent producers due to the State system of reporting, they get a less blended price than the independent producer who is enjoying a special market perhaps. The farmer who is organized and is handling about 50% of the surplus milk, he takes a blended price return for all his milk, which is less, due to this difference in price in New York City, which is breaking down the whole price structure. If he was only carrying his portion of the entire surplus produced all over the Milk Shed then there would not be that price difference. In other words, in my opinion the differential creates an unfair discrimination between the farmers who are organized and those who are not to the disadvantage of the latter.

By the Special Master:

I cannot agree entirely with Mr. Pilger's opinion that the differential increased the outlet for independent producers because, if I understand the reports that have been made by specialists, when the prices are increased or decreased slightly in the Metropolitan area it does not affect except temporarily the total amount of milk consumed. If the prices were leveled off tomorrow I have not any way of knowing whether it would be on the high price or on the [fol. 253] low; if it was on the low price, and this producer had the outlet to one of his dealers he would still get his share of the milk that was being sold in the Metropolitan area.

Recross-examination.

By Mr. Kramer:

Defendants' Exhibit 12 is a memorandum made in September, 1932. It does not give the specific prices which we paid for the unadvertised dealers' milk; it gives those dealers whose milk we bought at the regular price and those whose milk we bought for less than the standard price. The latter are marked with a cross; the ones that are not marked were not cutting prices. There are 86 dealers listed in the memorandum; it contains the best information I could get at that time as to the number of dealers doing business in the Metropolitan area. We were not in touch with all those dealers. There are 10 cross marks on the list.

Defendants' Exhibit 12 was received in evidence.

We interviewed quite a number of the dealers. Those that were price-cutting we talked to and also to others who [fol. 254] were complaining of these price-cutters. I do not recall the exact number, I would not say the majority. We were only interested in the ones that were demoralizing the market in a large way.

The prices to be paid by the independent dealers to the farmer under the Milk Control Law for milk in its various classes are the same as the prices to be paid by the advertised dealer. The smaller independent dealers are trying to place most of their supplies in Class 1 outlets. It has been my observation that these dealers when their supplies from producers were exceeding the Class 1 outlets eliminated the producer, deprived him of a market. Those dealers who have a contract with their producers have usually taken the entire production from the producer; those dealers that do not have any contract or understanding have eliminated producers to meet the market conditions. The blended return to the producer may vary from month to month or season to season, and in order to keep his price to the producer high the independent dealer tries to eliminate the milk that has to go into the lower classifications, because he has a perfect right to do that, and that is one of the reasons why they have been able to pay a slightly higher price to the producer, because most of that pro- [fol. 255] ducer's milk has been utilized in the higher classi-

fications. The independent producer selling to the independent dealer has received anywhere from 10¢ to 50¢ a hundred more than the member of Dairymen's League.

I believe the elimination of the differential would be an advantage to all producers and that it would not necessarily be a disadvantage to the independent producer. I don't see how it could drive the independent dealers out of business. I don't see why he would be unable to sell his unadvertised milk at the same price as advertised milk, because it is produced under the strict supervision of the New York City Board of Health; it is accepted and supposed to be of A-No. 1 quality, whether it is sold at the one price or at the lower price. In my opinion the independent producer would still continue to have his outlet in the independent dealers doing business in New York City. If the differential is eliminated I have no way of knowing whether the independent dealers are going to sell at the higher price or the lower price, and if they are selling at the lower price the same quality of milk I can see no reason why they should not continue to enjoy the same market as they do now. I feel that if the consumers realize [fol. 256] that this milk is all produced under the same regulation, they would buy through their usual supply; if they have been getting milk from a dealer and prices were the same, they would probably continue with that same dealer whether there is some talk over the radio or newspaper advertising, or not, because after all the milk is under sanitary regulation.

It is my opinion that it would be best for the producers in New York if they were all in one marketing organization, whether it be Dairymen's League or some other organization.

Recross-examination.

By Mr. Manley:

By the notation next to Clover Milk & Cream Company on Defendants' Exhibit 12 I do not mean that Borden lost 15 routes to that company; I mean that they lost some of the business on 15 different routes.

Redirect examination.

By Mr. Pfeiffer (continued):

In the period prior to the Milk Control Law the independent dealers were paying the independent producer

somewhere around the Sheffield blend price. They used that as sort of a basis to go by, some of them did. Some of them bought the fat at so much a hundred and some bought it on a hundred and the butter fat basis with differentials [fol. 257] up and down from a predetermined amount of butter fat. In some of those instances, the dealers did not fix their price on blended returns from various classifications in which the milk was sold. It was a price that they paid the farmer, in some instances just enough above to retain those farmers as shippers of that particular dealer. [fol. 258] Practically all of the milk the independent dealers in New York City bought was used for fluid consumption, but nevertheless, generally speaking, they paid the farmer upon the basis of the Sheffield blend.

Recross-examination.

By Mr. Kramer (continued):

At the time I was in New York City I knew that the bottle deposits had been withdrawn, and while we were there some of them restored it again. The whole matter of bottle deposits was under discussion at that time and we as a Committee were anxious to see the bottle deposit restored in a uniform manner. Apparently there was no uniformity in what should be charged as a deposit on the bottles, and while we were in the City Sheffield restored the bottle deposit on a portion of their trade. I do not recall that they restored it on all of the sections that they delivered milk to, but there was a bettering of that situation before we left that fall.

Redirect examination.

By Mr. Pfeiffer (continued):

I did not hear of this question of the deposit on bottles being a part of the price warfare that was going on. It was one of these—well, I do not know whether the word "chaotic" applies or not to the market situation—it was [fol. 259] one of the factors that seemed to be disturbing and breaking down the price structure which we farmers were interested in.

Mr. Pfeiffer read into the record, over the objection of the defendants, the following excerpt from the report of

the Director of the Division of Milk Control for the year 1934:

"Perhaps the most serious obstacle to preventing price disturbances in the New York City market is the maintenance, by law, of two resale prices from stores and, at the same time, requiring the same price to be paid dairymen for milk sold both as advertised and unadvertised brands. Advertised brands of milk are sold from stores at 12¢ a quart while unadvertised brands are sold for 11¢ a quart, or at the rate of 47¢ a hundred pounds less than the advertised brands. Dual prices to producers for milk sold as advertised and unadvertised brands would only complicate an already complicated situation and would present an almost impossible auditing and enforcement problem. Most of the violations which have led to many persons advocating the removal of all resale prices have been in sales of milk to stores. Upstate markets, which operate on a one-price basis, are more stable than the New York City market with its dual-price structure."

Mr. Kramer objected to the introduction of the foregoing excerpt on the ground that it was irrelevant, not controlling upon the situation as it existed at the time of the enactment of the Milk Control Law and merely an opinion. Mr. Manley objected to its introduction on the ground that it was a matter of opinion. Both objections were overruled and the defendants excepted.

[fol. 260] Defendant's Exhibit 13 was received in evidence.

Frank Goodman was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a grocer for 18 years. My place of business has been in Brooklyn for the last 14 years and before that it was in Manhattan. I am Chairman of the Board of Directors and Vice President of East New York Grocers' and Dairymen's Association which has approximately 350 members.

Prior to November, 1931, I sold bulk milk of an independent dealer and Sheffield's bottled milk. In November, 1931, at the time when the papers came out with statements with reference to bulk milk, and bottled milk immediately came into the market I began to sell bottled milk of Eisenberg Farms as well as Sheffield's. I was familiar during this time with the prices which storekeepers paid for advertised and non-advertised milk. There was a difference of 40¢ and sometimes 60¢ on bulk milk and a difference of 1¢ on bottled milk. In 1932 when the bottle deposit was taken off by Borden and Sheffield there was a difference of 2 or 2½¢ between the unadvertised and the advertised [fol. 261] brands. When I bought Sheffield and Eisenberg milk there was a difference of 1¢ in the prices that I paid.

I now handle milk of Borden, Sheffield and 3 independent dealers. My store is located in a populated district made up mostly of poor people. In my opinion the effect of the removal of the differential would be that unadvertised milk could not be sold in the stores.

Cross-examination.

By Mr. Pfeiffer:

The removal of the differential would hurt my business if the milk were sold at the store at only 1¢ under the retail price; in addition Sheffield and Borden are carrying butter, eggs and many other dairy products and it would not pay the customer to come down and buy at the store. If the difference were 2¢ between the retail price and the store price I feel that we would hold the business.

Prior to November, 1931, I only handled bulk milk and a little bottled milk of Sheffield that the consumer required. Up until 1931 the independent dealers as far as I was concerned did not carry bottled milk. Before that time I don't know whether there was a differential between the bottled [fol. 262] milk of the advertised brands and the bottled milk of the independents.

I paid 1¢ less for Eisenberg milk than for Sheffield after 1931 except when the bottle deposit was taken off and the difference was between 2 and 2½¢. During that time I did not make more money on the Eisenberg milk; the customer got the benefit out of it; the customer benefited by buying cheaper than the advertised brand. It made no

difference to me. For a short period I guess I did make more money on the Eisenberg milk.

I am interested in the differential in order that the consumer will buy the milk from me so that I will be able to exist. If the price were the same I don't know what the effect would be.

I now have got 5 dealers in my store because the different trade requires it—that is, one likes that brand, the other likes that brand, and I must give them whatever they require.

Redirect examination.

By Mr. Kramer:

I pass along to the consumer the differential at which I now buy the unadvertised brands. If the differential were removed it would not have any effect on my business if there were a sufficient differential between the retail price and the store price. I believe that the unadvertised milk would probably fall out from the store.

[fol. 263] NATHAN BLACK was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a grocer in Brooklyn for 16 years. Prior to 1932 I sold bulk milk of an independent dealer and Borden and Sheffield bottled milk. After 1932 I also sold bottled milk of Eastern Farms. I always bought Eastern Farms milk 1¢ or 1½¢ cheaper than Borden and Sheffield.

Cross-examination.

By Mr. Pfeiffer:

My store is in the Crown Heights section. There was a price warfare in 1932 in that neighborhood in connection with the sale of bottled milk by stores and prices were up and down the same as all over. I know what I paid for milk but I do not know what other storekeepers paid.

Redirect examination.

By Mr. Kramer:

If advertised milk were sold at the same price as unadvertised I wouldn't sell as much milk; the customer would expect it to be delivered to the home. In my store the most that would be sold would be the advertised brands because [fol. 264] my section is more American, they read in the papers and they buy the advertised brands.

WILLIAM GINSBURG was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am a grocer in Brooklyn. I have been a grocer for 21 years. In 1930 and 1931 I had 2 stores in Brooklyn at which I sold bulk and bottled milk. I sold bulk milk of an independent dealer and bottled milk of Borden, Sheffield and Ferndale. I paid from 1¢ to 1½¢ less for Ferndale than for Borden and Sheffield. I always paid from 1¢ to 1½¢ less for unadvertised milk than advertised milk.

I tried for a little while to sell the unadvertised brands at the same price as Borden and Sheffield but I did not succeed because the consumer always said that for the same amount of money she would rather take Borden or Sheffield; I tried it for a week or 2 but I failed to get the same price so I had to come down again on the unadvertised brands. I tried to get the same price 3 years ago, [fol. 265] 2 years ago and even last year because I figured that 1¢ or 1¼¢ is not enough to make a profit on bottled milk for my 17 hours work a day, but I could not get it and had to go back to the cheaper price on unadvertised milk.

I have occasion to speak daily with my customers with respect to the sale of milk. In my opinion I would not be able to sell unadvertised milk at the same price as advertised milk; the customers would rather buy the advertised for the same price.

Cross-examination.

By Mr. Pfeiffer:

I am now buying bottled milk from Local and Cooperdale. I have always paid the Milk Control Board prices to them.

My stores are in the Crown Heights section of Brooklyn. I never had a price war in connection with milk because I am situated where there are no other stores within an area of a square block so I don't have to fight around with milk prices. I don't remember exactly how much I paid for Ferndale milk before the Milk Control Law. Before the Milk Control Law I bought the unadvertised milk cheaper and sold it cheaper than the advertised.

I am now buying from both Cooperdale and Local as well [fol. 266] as Borden and Sheffield because I am selling on an average of about 15 cases a day, so I spread the business. I pay exactly the same price to all independents; I would not take any chances on buying it cheaper or selling it cheaper.

We did not have any price wars in 1932 as far as I can remember. Before the Milk Control Law we used to make 1½¢ on Borden and Sheffield milk and 2¢ on the unadvertised brands so that it was to our interest to sell unadvertised brands. It is to our interest now to have the differential in the law continue.

Some of my customers ask for Borden's or Sheffield's; others for the cheaper milk. Some of my customers have been buying Cooperdale milk for a couple of years. I think that they would stop buying it if there were no differential in price. Half of my customers buy Borden and Sheffield. My personal opinion is that the other customers who are now getting independent milk would stop buying it if the price were the same. I don't say I wouldn't sell a single bottle, but it would drop an awful lot. I have tried many times, last year even, to get the same price for the unadvertised brands but I failed to get it.

[fol. 267] ABE GOLDSTEIN was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a grocer for 15 years. For 2 years I have had a dairy in the Bronx and before that I had a grocery store. Prior to 1932 I sold bottled milk of Borden, Sheffield and Morrisania. Morrisania was always 1¢ less than Borden and Sheffield. I now handle about 2 cases of Sheffield and 7 to 10 cases supplied by 4 independent dealers.

I sell the unadvertised milk at the lower price. I have not tried to sell at the same price because for the difference that the customer saves I may be able to sell something else in my store. In my opinion I would not be able to sell unadvertised brands at the same price as the advertised. The average woman that comes in a store would always ask for Borden's or Sheffield's; perhaps for 1¢ cheaper they try to save the 20¢ or 30¢ a week, whatever it amounts to.

[fol. 268] ISAAC MANDELL was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been a grocer for 19 years. During that time I have had stores all over Brooklyn and Coney Island. For some years before 1932 I sold bottled milk of Borden, Sheffield and Ferndale and bulk milk of Sacks. I always paid 1¢ and sometimes 1½¢ less for Ferndale than for Borden and Sheffield bottled milk. I continued to sell the same brands after 1932; during the time when Borden and Sheffield took off the bottle deposit there was a difference of about 2 or 2½¢.

I now sell 12 to 15 cases a day of Ferndale and from 4 to 6 bottles of Borden.

I have occasion to speak with my customers and they talk to me about the purchase of milk. In my opinion I

would not be able to sell any Ferndale milk if the price were the same as Borden and Sheffield.

Cross-examination.

By Mr. Pfeiffer:

Before 1932 I was selling a case or 1½ cases of Borden milk and 6 or 8 bottles of Ferndale. I am selling a great deal more of the independent milk than I did before the Milk Control Law, but at that time we used to sell more [fol. 269] bulk milk than we are selling bottled milk today. The reason I am selling such a large amount of independent milk and so little of Borden is that the customers are getting the unadvertised milk for 1¢ less; that was true before the Milk Control Law but at that time we were not selling much bottled milk; we did not care to bother with the independents' bottled milk.

By the Special Master:

I carried 5 or 6 bottles of independent milk before 1932 because I figured that maybe I could make a couple of cents extra. I don't force the independent milk on a customer; if the customer asks for Borden's I give him Borden's. I had Sheffield's in there too and I could not sell it on account of the difference in price. I used to take 4 or 6 bottles a day and I would have it left over so I took it out.

Cross-examination.

By Mr. Pfeiffer (continued):

I am speaking now of after the Milk Control Law. My experience as a storekeeper has been that I can't sell the advertised brands because of the increased price that the customer has to pay for them.

[fol. 270] Redirect examination.

By Mr. Kramer:

After the first Milk Control Law in April, 1933 until April, 1934 I was selling an average of what I am selling now as between Ferndale and Borden and Sheffield.

SOL KATZ was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

Defendants' Exhibit 14 is a letter that I have here from my association. We had a meeting last night. I told them I attended the hearing yesterday and I brought the question up. I am the code member of the Food Industry in Queens and also District Authority of Metropolitan New York. I am in care of all grocers from Brooklyn to Poughkeepsie. I have been a grocer for 10 years and have a store in Queens. For 2½ years I have been President of Queens Retail Food Dealers Association, having a membership of 335 grocers.

I sold bulk and bottled milk in my stores before the Milk Control Law. All the time since I have been in business I paid 1¢ less for the unadvertised brands. I was acquainted with the prices which storekeepers generally in New York [fol. 271] City paid for bulk and bottled milk during the period prior to the Milk Control Law and I know they all paid 1¢ less for bottled milk of the unadvertised brands and 20 to 40¢ a can less for bulk milk.

I am sure that if I had to sell the unadvertised brands at the same price as the advertised I would not be able to sell any unadvertised milk in my store.

Cross-examination.

By Mr. Pfeiffer:

I would not be able to sell a single bottle of unadvertised milk.

My testimony as to what other storekeepers paid is based on what they told me. I questioned them to see that I was paying the right price.

The Queens Retail Food Dealers Association had a meeting last night at which the subject of the differential between advertised and unadvertised brands was discussed for the first time. I brought it up because I was told of this hearing yesterday by a friend. After the meeting listened to what I had to say they took unanimous action in favor of milk being sold as it is today, a penny difference.

I now sell 7 cases of Queens milk, 8 bottles of Borden's and 6 bottles of Sheffield. I don't make any profit on milk [fol. 272] and that is true of every grocer, but the carrying of milk is an asset because 9 out of 10 women who really come for milk will look around and buy something else.

It would not make any immediate difference to me if the price of all milk were the same but eventually it would make a difference. It would just form into a monopoly once Borden and Sheffield are in my store. To be frank with you I would not trust them. It looks to me like a trick to have it one price. I cover Nassau and Suffolk Counties twice a week; I have questioned grocers out there and I notice that Fred Beers dropped 400 cases. Many stores carried Fred Beers and today hardly any of them do. 9 out of 10 stores carry Borden and Sheffield because the prices are the same. This will happen in New York. Once the prices are the same what will become of us? Then they will have the prices the same in the houses; their trick is to take it out of our stores. That is the reason why I am interested in this, to protect the retailers. I am fearful that the Milk Control Board is not going to keep the 2¢ dif- [fol. 273] ferential between the retail price and the store price and that the milk will be taken out of our stores.

Defendants' Exhibit 14 was received in evidence.

I am now selling 8 bottles of Borden's milk a day to 4 customers—it looks like shareholders. Out of all the people who come into my store there are only 4 customers who insist on Borden's milk.

Redirect examination.

By Mr. Kramer:

I sold about the same proportion of Borden and Sheffield and unadvertised milk in the early part of 1933 and 1934 as I do now.

Max Title was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have had a grocery store for 11 years in Queens. Prior to the Milk Control Law I sold bulk and bottled milk of

Queens and bottled milk of Borden and Sheffield. I began to sell Queens bottled milk in 1930. There was always a difference of 1¢ between Queens and Borden or Sheffield. I am now selling Sheffield and Queens. My opinion is that Queens might as well close their doors if they have to get the same price as Sheffield.

[fol. 274] I would not be able to sell any Queens milk.

Cross-examination.

By Mr. Pfeiffer:

In 1930 I was selling 1 case each of Queens, Borden and Sheffield. I am now getting 10 cases from Queens and 3 from Sheffield.

There was never any price war out in my section. There was only price-cutting for a short while when the bottle deposit was taken off; there was a time then when we were selling unadvertised brands at 2¢ less but otherwise there was the same difference all the time.

By the Special Master:

There are a lot of grocers out in my section but we never had any wars on milk. My knowledge is confined to the 3 or 4 blocks around me. What went on beyond that I don't know.

Redirect examination.

By Mr. Kramer:

Before the conversion of bulk milk to bottled milk I sold 3 or 4 cans a day of Queens, so that I am now selling less bottled milk of Queens than I sold bulk and bottled before conversion. I sell slightly more Sheffield milk now than I used to sell before.

[fol. 275] Recross-examination.

By Mr. Pfeiffer:

I sell Sheffield milk because the customers just actually demand it. I am only selling 3 cases as against 10 of Queens, and I discontinued Borden's about 2½ years ago.

STIPULATION AS TO CERTAIN TESTIMONY

It was stipulated that the defendants were in a position to call, in addition to the above named witnesses, 50 individuals who had been engaged in the grocery business selling bulk and bottled milk in New York City for 5 years or more and that such individuals, if called as witnesses, would give testimony to the same general effect as the testimony given by the grocers already called on behalf of the defendants.

LAURANCE L. CLOUGH was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Manley:

I am employed by the Division of Milk Control, Department of Agriculture and Markets, State of New York, in the capacity of Supervisor of Auditing. I have held that [fol. 276] position and a similar position with the Milk Control Board since June 1, 1933. I have charge of the auditing of dealers' monthly reports and the compilation of statistics therefrom and other general duties connected with that type of work. I have direction of the files consisting of the monthly reports of the dealers, the correspondence with dealers and the application of dealers for licenses.

Pages 1 to 3 of Defendants' Exhibit 1 are the parts of the Plaintiff's application in May 1933 which were supplied in response to Question 15 reading:

"Supply the following information relative to sale of milk and cream, listing separately each grade sold in bottles to consumers, to stores and to restaurants during the month of March 1933 in —. Applicant selling milk and cream in 2 or more localities where different price schedules prevail must supply the information called for in Items 15 to 22 inclusive on a separate Schedule E wherever different prices are in effect in the different localities."

Defendants' Exhibit 1, pages 1, 2 and 3 were received in evidence.

In answer to Question 22 of the application the plaintiff stated that it sold milk under the trade name "Borden's"

and that its milk had been advertised under such trade [fol. 277] name since 1857.

I attended the College of Agriculture at Cornell University for 4 years and later took 2 years of graduate work at that Institution in agricultural economics. From July 1, 1932 to February 15, 1933 I was employed as assistant to Dr. Spencer in research work for the Joint Legislative Committee to investigate the milk industry. Since I have been with the Milk Control Board I have had occasion to participate in a great many hearings and proceedings at which facts were elicited relative to the manner in which various dealers do business in New York City. I am conversant with the principal dealers in New York City and the nature of their business and the relative volumes of business done.

I have made a search of the applications of a large number of the principal dealers in New York City to learn the various prices stated by them in such applications. Defendants' Exhibit 15 is a list of those dealers together with the prices at which they were selling to stores in New York City in March, 1933 as represented in the applications to which I referred. It also gives certain other data such as the time when the last price change took effect; in answering the question relative to the date of the last [fol. 278] change in price there seems to have been some misunderstanding among the dealers as to what information was intended to be elicited, many dealers answering that such date was April 17, 1933 which was the date upon which the first prices became effective as established by the Milk Control Board.

Cross-examination.

By Mr. Pfeiffer:

Defendants' Exhibit 15 does not purport to contain all the New York City milk dealers who applied for licenses in May, 1933. The applications for licenses from which this list was prepared were all filed subsequent to the enactment of the 1933 law containing the differential provision. The pencil notations beside the names indicate the particular section of the City in which the company is located..

Defendants' Exhibit 15 was received in evidence.

As a check on this exhibit Mr. Manley stated that he would supply the plaintiff with like information relative to the applications of any other dealers that the plaintiff would like to have included, and the Special Master ruled that the plaintiff was to have access to all applications for that purpose.

[fol. 279] Direct examination.

By Mr. Manley (continued):

Arnstein Beckman is not in Defendants' Exhibit 15. Defendants' Exhibit 4 is the application of that dealer; in answer to Question 15 they say they were selling Grade B bottled milk to stores in New York City in March, 1933 at [fol. 280] 6.3¢ per quart and that the last price change occurred January 2, 1933, and that the price before that was 7¢. Defendants' Exhibit 3 is the application of McKay Milk Products in which they say that they sold in March, 1933 at 6¢ per quart and that the date of the last price change was January 24, 1933 and that the price before that was 7¢ a quart.

There is a difference between Borden's and Sheffield's on the one hand and Dairymen's League on the other in relation to how well advertised their products are. Dairymen's League has not advertised its milk for as long a period of time as the other companies; its program of extensive advertising began, I believe, in the latter part of 1931 or early 1932. It has taken over as a large proportion of its business the business of former independent dealers and has continued those businesses, under their own various names, along the same lines as before, selling unadvertised brands of milk. Dairymen's League has a very small proportion of retail business and thus does not have the large number of retail wagons on the streets which the larger companies have and which are potential advertisement. The doing of a retail milk business under the conditions of the milk industry in New York City is a useful method of [fol. 281] making the product of the company well-known to the public.

I heard Mr. Eastlack testify that he thought there were about 1,000,000 quarts of bottled milk being sold through stores in New York City and that the 4 advertised companies were only selling 21.2% of that; he based that ob-

servation in part upon some data by Dr. Spencer which appears at page 163 of the Pitcher Report. There is a more recent study by Dr. Spencer indicating the percentage of wholesale business in New York City done by the 4 advertised dealers in an article in the February, 1935 issue of Farm Economics published by the New York State College of Agriculture. The data used in this article was obtained in October, 1933. In a table which appears at page 2138 there is a reference to dealers having more than 100 routes; the item is that there are 4 such dealers and from my knowledge of the milk business in New York City I can say that these are the 4 advertised companies. These 4 dealers are listed as having 3,956 retail routes out of a total of 4,432 in the City or 89.2%. They are credited with having 316 wholesale routes out of a total of 968 or 32.6%. Their daily sales in quarts, both wholesale and retail, are [fol. 282] represented as being 1,638,246 out of a total of 2,437,795 or 67.7%. Using the figures given in the table for cream they do 46.8% of the cream business. This article by Dr. Spencer is as recent an indication as I know of of the relative proportions of milk handled in New York City by the advertised and by the other dealers.

Defendants' Exhibit 16 is a chart showing for the period from April to December, 1934 a comparison of receipts of milk in the Metropolitan area as reported by the United States Department of Agriculture with Borden's Class 1 milk as reported by the Company in its reports to the Division of Milk Control, using as 100% in both instances the average daily figure for the month of April, 1934.

Cross-examination.

By Mr. Pfeiffer (continued):

Defendants' Exhibit 16 purports to cover all Class 1 milk sold by Borden in the Metropolitan area; Class 1 milk is defined as milk leaving the country plant in fluid form, after certain adjustments. Milk purchased in the country and sold in the country by Borden on a Class 1 basis is included [fol. 283] if it was sold for Metropolitan use. Milk sold in Borden's up-state branches is not included. If Borden has included in their reports sales in the country to other companies not affiliated with Borden such sales are included in the figures which I have used in the preparation of this

exhibit. I have not prepared a similar chart for the period from November, 1929 to November, 1934. This exhibit in no way segregates Borden's store business to show what the decline in the store business for the corresponding period has been.

Defendants' Exhibit 16 was received in evidence.

Direct examination.

By Mr. Manley (continued):

Defendants' Exhibit 17 is a chart showing the volume of Class 1 milk handled by Borden from May, 1933 to December, 1934. It is a comparison merely between the volume of Class 1 handled by Borden in the 2 years and does not compare it with the receipts in the Metropolitan area for those years. It is confined to the Metropolitan area as in the case of Defendants' Exhibit 16.

Cross-examination.

By Mr. Pfeiffer (continued):

Milk "handled" does not necessarily mean milk "sold." The daily average of Class 1 milk handled by Borden in [fol. 284] May, 1933 was about 2,300,000 lbs. and in May, 1934 it had dropped to about 2,200,000 lbs. May, 1933 was the first full month of the operation of the Milk Control Law. So that in that year of milk control with the differential there was apparently that drop in the volume of Class 1 milk handled by Borden. This exhibit is not related to consumption in the Metropolitan area. The figures include store milk sold by the plaintiff but there is no segregation. The figures reported by Borden from which this exhibit was made up include milk bottled by Borden for other dealers and sold under names other than that of Borden's.

Defendants' Exhibit 17 was received in evidence.

Direct examination.

By Mr. Manley (continued):

Defendants' Exhibit 18 is a chart giving a comparison of the daily volume of Class 1 milk handled by Borden and by 12 independent dealers using April, 1934 as 100%. It is

based on the same Class 1 data used in connection with the [fol. 285] preceding exhibits. I selected the 12 independent dealers used in making this exhibit; I selected dealers that would be located in the various sections of the Metropolitan area leaving out of that selection the very large or the very small ones, taking some practically at random.

Cross-examination.

By Mr. Pfeiffer (continued):

Defendants' Exhibit 18 is based on reports made by Borden and by those 12 independent dealers. With possibly minor exceptions these independent dealers sell only in New York City. The figures for Borden include all their sales in the Metropolitan area.

There is no data on record in our office which would enable me to prepare a chart showing a comparison of the daily volume of the store business of Borden with these 12 independent dealers for the same period; our reports do not call for sales to stores. It is impossible to tell from this exhibit whether Borden's sales to stores in that period have increased or decreased; the same is true of the independent dealers except for the fact that they are selling largely store milk.

Defendants' Exhibit 18 was received in evidence.

[fol. 286] Direct examination.

By Mr. Manley (continued):

Defendants' Exhibit 19 is a chart showing the volume of bulk and bottled milk sold by Borden to stores for the same weeks in the period from November, 1929 to November, 1934 used in the charts put in evidence by the plaintiff; the data for this exhibit was taken from the records of the plaintiff and the working papers which were used as a basis for the plaintiff's charts. This exhibit merely shows that the quantity of bottled milk has increased decidedly, whereas the quantity of bulk milk has decreased.

Cross-examination.

By Mr. Pfeiffer (continued):

The week ending June 8, 1933 shows a sharp rise from the week of May 25, 1933 in the quantity of bottled milk

sold; that would obviously be true with the abolition of the sale of bulk milk. From June 8, 1933 to November 8, 1934 the quantity of bottled milk sold by Borden to stores declined for the particular weeks shown except for the period around May, 1934.

Defendants' Exhibit 19 was received in evidence.

[fol. 287] Cross-examination.

By Mr. Pfeiffer (continued):

The exhibit shows that the sales of bottled milk to stores by Borden in the week of June 8, 1933 were close to 1,400,000 quarts and that in the week of November 8, 1934 they were approximately 1,100,000, so that there was a drop of practically 300,000 quarts between those 2 weeks. There is a decrease of approximately 25% in the total sales by Borden to stores between the weeks of November 14, 1929 and November 8, 1934. In each year there are only 4 weekly periods given; I am not prepared to state as to the representativeness of those particular weeks but I have no information to the contrary.

Ely B. Johnson was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have been a dairy farmer for 25 years at least. During that time I have been familiar with the milk industry in New York State. I know a great many milk producers throughout the State and have for many years. I have sold my milk to Dairymen's League ever since the League [fol. 288] was organized and am familiar with the classified price plan under which it operates.

In my opinion the effect of the differential between advertised and unadvertised milk so far as farmers are concerned is that it breaks down their price structure. I think that it is important that all producers of milk who have complied with the Board of Health regulations of the Metro-

politan market should participate equally upon an equalized basis in the benefits and burdens of marketing milk and I think this law gives the unorganized producer an undue advantage over the organized producer, in that it permits him to get a greater proportion of his milk into the fluid market without bearing his proportion of the surplus.

Cross-examination.

By Mr. Kramer:

I produce about 2,000 lbs. of milk a day on my farm. I have had no contact with independent dealers in New York City, my contact having been with Dairymen's League.

The advantage that I have spoken of which the independent farmer now has with respect to his sales to independent dealers I assume is the same advantage which [fol. 289] the independent farmer had before the Milk Control Law. I am a member of the Membership Auditing Board of the League which audits the accounts of the League.

Redirect examination.

By Mr. Pfeiffer:

I am the author of the so-called Johnson Plan referred to in the report of the Pitcher Committee. It was a plan for the co-operative marketing of milk designed to conserve the interests of all the dairymen in the New York Milk Shed. It was proposed about 1925 and its object was to unite in a single organization all the dairymen of the State.

In 1925 I was a member of the Ten Eyck Milk Program Committee which was appointed by a committee of delegates from all over the New York Milk Shed for the purpose of considering the problems of the milk industry and analyzing my plan as an approved plan for co-operative marketing of milk. The Committee met with independent farmers and held hearings quite similar to the Pitcher Committee at which farmers, marketing organizations and transportation organizations presented their views.

I was also a member of the Emergency Milk Committee in 1932.

Recross-examination.

By Mr. Kramer:

I don't know how many independent farmers are selling [fol. 290] to independent dealers in New York City nor do I know how many independent farmers there are in New York State. I don't know what effect the elimination of the differential would have upon the business of the independent dealer in New York City. When I was with the Emergency Milk Committee I don't recall that I knew the relative prices at which wholesale milk was sold by the advertised and non-advertised dealers in New York City.

Laurance L. Clough was re-called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Manley (continued):

Only 12 independent dealers were used in making up Defendants' Exhibit 18 because it would have been impossible in the time at our disposal to make a similar tabulation for all of the dealers in the Metropolitan area. I therefore selected a few dealers in each of the boroughs that I felt were not too far from being representative without referring to any records. There was no other compilation of data other than the material on which the exhibit was based; I did not look over the reports of other independent [fol. 291] dealers to see if they would have fitted better into the plan.

I find that the percentage reflected in the exhibit for December, 1934 is incorrect. On the dotted line which represents the 12 independent dealers the percentage should be 85.

Cross-examination.

By Mr. Pfeiffer (continued):

The 12 independent dealers that I picked out seemed to me to be normal as nearly as I could tell without reference to any record; I would say that they were probably dealers who were handling a good proportion of wholesale

milk into stores and who had been in business for some time and were representative of the independents in some respects. I thought that they represented fairly stabilized independents.

Plaintiff's Exhibits 7 and 8 are the two work sheets from which I prepared Defendants' Exhibit 18.

Plaintiff's Exhibits 7 and 8 were received in evidence.

In the next to the last column to the right on Plaintiff's [fol. 292] Exhibit 7 which is the index for December, 1934 as compared to May 1933 the figure for December, 1934 should be 97.4 instead of 92.4. On Defendants' Exhibit 18 the percentage of the independent dealers for July, 1934 is given as 91 and in the index in the last column of Plaintiff's Exhibit 7 it is given at 94. In the latter exhibit the percentages are computed on the total monthly basis. I have another work sheet in which those percentages are computed on a per day basis, giving a different set of percentages which were used on Defendants' Exhibit 18. The daily figure gives a more accurate result.

The first independent dealer whose name appears on Plaintiff's Exhibit 8 is C. J. Fayen. I would not say that it is representative of the independent dealers that in one month they lost two-thirds of their business as Fayen did between May and June, 1934. There are two possibilities that would account for that drop; one is that his business may have been transferred to lower classes and the other that there may have been some arrangement whereby the milk which he purchased from a plant in Vermont was sold through another outlet. It may also have been that he had [fol. 293] a contract with some other dealer to pasteurize and bottle milk for that dealer and that that contract was lost at that time. I presume that this drop in Fayen's business does not have any bearing on his store sales in that period of two months.

Plaintiff's Exhibit 8 shows that in the case of Sunshine Farms there was a drop of 40% between August and September, 1933. I don't think that that represents a normal drop in an independent's business. I don't know what the explanation is in this case. I would not claim that this drop represents a corresponding drop in sales to stores. In the case of Ideal Farms, Inc. there was a drop of 50% between July and October, 1933. I don't know whether that decline has anything to do with store sales in that

period but I would not think that there was any such decline in that period.

There was a drop of over 80% in the Class 1 milk reported by Ideal Farms between August and November, 1934. I do not believe that change is due in a very large measure to the change in store business, but I would not say that none of it was due to change in store business.

It would not appear upon examination of the figures [fol. 294] that the business of Triangle Farms, Inc. was substantially typical of the independent dealers. If I had had any figures or records available when I selected these dealers I might have made an entirely different selection. Just from my general knowledge I did not realize that there had been any such changes in the volume of Class 1 milk handled by Triangle Farms.

Before I prepared Defendants' Exhibit 18 I realized that these 12 independent dealers showed tremendous variations but I still used the same 12.

Redirect examination.

By Mr. Manley:

The 1933 figures concerning which I have testified do not affect Defendants' Exhibit 18 which commences with the month of April, 1934 when the 1934 Milk Control Law was enacted. The exhibit tends to show rather roughly and only by relation to the only data available to me, that is, Class 1 milk handled by the dealers, the experience of Borden and 12 independent competitors in New York City. Class 1 milk in general is milk that leaves the country plant in fluid form and intended for use for fluid consumption. That would include fluid milk whether its ultimate use is wholesale or retail.

[fol. 295] Some of the dealers listed in Plaintiff Exhibit 8 had substantial gains in business during the year 1934. That is true of Triangle Farms, Fred Beers and Ideal Farms.

Recross-examination.

By Mr. Pfeiffer:

Class 1 milk as defined in Official Order 73 does not bear an exact relationship to the final sale of milk in fluid form

in New York City. Borden reports as Class 1 milk handled by it such milk as it pasteurizes and bottles and sells to other dealers and also milk shipped from Borden country plants to plants operated by Dairymen's League and sold by Dairymen's League. All milk sold to a State or Municipality or public institution is included in the volume of Class 1 milk reported. In my opinion Defendants' Exhibit 18 has a substantial bearing on the store business done by Borden and the independent dealers only in so far as the store business in fluid milk is included in the volume of Class 1 milk handled on which this exhibit is based. I don't know what proportion the store milk is of the total.

[fol. 296] ADOLPH HOFFMEYER was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been employed by Ferndale Farms for 8 years as a wholesale milk driver. I deliver and collect for milk sold to stores in Brooklyn. Prior to 1926 I had a grocery store in Brooklyn for about 18 years. In delivering milk to stores before the Milk Control Law I met with drivers of Borden, Sheffield and Renken every day. They received for their bottled milk 1¢ more than I received for mine and 20 to 30¢ more for bulk milk. I do not know of any time when the storekeeper paid the same price for Ferndale as he paid for Borden and Sheffield.

When I had my grocery store I sold Borden and Ferndale bottled milk. There was 1¢ difference; I never paid the same price for Borden as I paid for Ferndale.

Cross-examination.

By Mr. Pfeiffer:

There have been price wars in the milk industry in New York; Borden came out with a big price war with a plain bottle, I think it was in 1932 or 1931. When that occurred Borden went to work and forced the little fellows out of the [fol. 297] store. Consequently the little fellows had to come

back with a lower price to hold their own. The difference between the Borden price and the independent was always 1¢ except when Borden came out with a plain bottle; that time we were as low as 2½¢ below.

I don't think the price war had anything to do with the elimination of bulk milk. Except for this period of price war on the bottle deposit Irwin Kotcher never sold his milk any more than 1¢ below Borden. He never had a fight that I know of with any other independent. Borden and Sheffield took business away from the routes that I was serving, but I could not say whether they did it by cutting the price. I do not know anything about arrangements made between the Borden branch manager and the storekeeper; the only thing I know is what I saw happening in the store.

STATEMENTS BY OFFICIALS OF BORDEN'S CO.

Mr. Kramer read into the record, over the objection of the plaintiff, the following statements made by officials of the plaintiff. The plaintiff excepted.

"Statement of Mr. W. H. Marcussen, Vice-President of Borden's Farm Products Co., Inc., Made at Public Hearing Before the Milk Control Board on April 18, 1933

"The Chairman:

[fol. 298] " 'I would like to ask whether or not there is any objection to permitting the sale of the unadvertised brands for one cent under the well-advertised brands? I mean on milk and cream.' (Page 41 of Stenographer's minutes.)

" 'Mr. W. H. Marcussen, of New York City:
(Representing Borden's Farm Products Co.)

"The position of our company on a matter of price to the public on advertised and unadvertised milk, is an entirely neutral one. It is of little moment to us, no matter in what direction this Board rules as to the price of fluid milk in bottles. On the matter of discretion or distinction in price on fluid cream in bottles, we wish to object to any such distinction, on the ground that cream is not advertised in the same sense that milk is, and that there is no condition existing in connection with cream that is in comparison with

what some of these men describe as a problem they are confronted with in the sale of milk. Some privilege or discretion in their behalf is possible in the case of fluid milk in bottles, but in the case of fluid cream in bottles we do not feel that they should be given the same discretionary privileges.

[fol. 299] "That does not mean that in principle we are agreeing with this thing. I believe that a company who has established a reputation in every way should not have to compete on an equal basis with those who have not done so. However, we do not want to raise that point at the present time in regard to fluid milk in bottles, but we do with fluid cream or other products.' (Pages 42 and 43 of Stenographer's Minutes.)

"Memorandum Referred to in Statement (Pages 68 and 69 of Stenographer's Minutes)

"Memorandum filed by William H. Marcussen on behalf of Borden's Farm Products at hearing by Milk Control Board, Tuesday, April 18, at Albany, N. Y.

"In order to further clarify my remarks made at the hearing today, I am submitting this brief memorandum on the Borden Company's position with regard to differentiation between advertised and unadvertised brands, in so far as these as yet undefined terms apply to milk.

"As I said in my oral remarks, our company assumes a neutral position on the Milk Control Board's determining of fluid milk prices. We are, of course, aware of the keen desire of the Board to render service to all phases of the milk industry, and to safeguard the interests of the con-
[fol. 300] suming public. For that reason we have not, at this time, interposed any formal objection to the interpretation of the term 'advertised' as applied to fluid milk. As a matter of fact, the Pitcher Bill is explicit as to the difference in prices to be charged for the so-called advertised and unadvertised bottled fluid milk sold by dealers to stores.

"In the matter of cream, we contend that there is no clearly defined public conception, engendered through advertising, as to the difference between the so-called 'advertised' or 'unadvertised' brands. The consumer's choice of cream is not, we believe, swayed by any publicity or advertising employed by those companies in the sale of their milk. The fact is that our company has not specifically

advertised its brand of cream. Our cream sales have been subjected to competition fully as severe as that experienced by any other company, large or small, known or unknown. We cite this in support of our contention that the name of our company has not been instrumental in aiding us to escape this keen competition. We wish to add that this drastic competition has been one of the elements chiefly responsible for the regrettable situation in the entire milk distribution field. It is therefore advisable that in dealing [fol. 301] with the cream situation, the Board should exercise extreme care to avoid any condition that might precipitate the chaos that previously existed in this branch of the industry and which reacted injuriously upon this field as a whole.

"If offered the opportunity, we shall be glad to amplify our arguments in this connection."

"Statement of William Marcussen, Vice President of Borden's Farm Products Co. Inc., Made at Hearing of July 14, 1933, Before the Milk Control Board. (Pages 10 and 11 of Stenographer's Minutes.)

" 'I want to call your attention to the fact that the milk distributing industry, since November, 1931, when prices began to move downward, that the milk distributing industry has observed a reduction in their operating spread equal to 73¢ a hundred, up to the time the Board put into effect its last order, which increased that spread to 88¢ per hundred. Those things were done by the milk distributing industry as a rather necessary feature. They came out of hard, economical practices and economies; but they left the industry, as one man put it here, on a war basis. It is absolutely impossible for the industry to carry on now and to meet these inflationary results and costs without its posi- [fol. 302] tion being considered at the same time. Therefore, because of that, I am going to make a very sincere recommendation to the Board—that the Board take action along the line of increasing prices to the producer, increasing prices to the consumer, but that the consumer pays, that some recognition be given in that increase to these costs that the distributor must honor. I, therefore, Mr. Commissioner, would like to file with your Board the recommendation that the present price of $1.88 be increased to a price of $2.12, and that at the same time the Board give to the distributing industry the help which it needs.'

"I would like to recommend at the same time that Class 2 milk price and Class 2-A cream be increased 20¢, making that $1.51; 2-B, 20¢ a hundred, making that $1.73; and 2-C, a similar increase, and that you help the industry to support those prices by an increase in the city of 2¢.

"I do not know that I can add anything to this statement, I think we have got to do at this time the thing that is reasonable. As we are doing it, we have got to keep this entire business—the producer and the distributor—on some normal, logical basis.

[fol. 303] "I would like to file at the same time a list of proposed city prices.

"(Following is the list of prices referred to above, by Mr. Marcussen, consisting of a schedule of proposed retail and wholesale prices of milk and cream for the Metropolitan Area; also a schedule of proposed wholesale prices on Extra Heavy, Light and Medium Cream, for Westchester County; all other prices in Westchester County to be the same as the proposed schedule for the Metropolitan Area.)

	By milk dealers to consumers	By milk dealers to stores and restaurants	By stores to consumers
Grade 'A' milk:			
Quart bottles	.15	.13	.14
Pint bottles	.10	.08	.09
Half pint bottles	...	.04½	...
Grade 'B' milk:			
Quart bottles	.12	.10	.11
Pint bottles	.08	.06	.07
Half pint bottles	...	.03½	..."

[fol. 304] "Excerpts from Statement Made by Mr. Harry A. Cronk, President of Borden's Farm Products Co., New York City

"At Public Hearing Before Milk Control Board on August 23rd, 1933

"Mr. Chairman: I am very happy to have this opportunity to sit down before you and lay some facts before you for your consideration. I have some matter prepared, but I would rather, for the moment, discuss some of the general features of this so-called spread.

"There seems to be, as we have indicated before, considerable mystery about the dealer's spread; and it also seems that no matter what records are published or statements are made, it has very little effect in the way of becoming

sound and settled in the minds of either the producer or the consumer.

"I think in that respect we all welcome some sort of an agency like the Control Board—making, as it intends to do, a study and bringing out the facts; because personally I believe—and I believe others believe with me—that that is about the only agency that we have had that has sufficient power to impress upon the minds of either the consumer or the producer the facts that they find, when they do find [fol. 305] them, in regard to the dealer's spread.

"There is at this time an opportunity for me to again plead, on behalf of my own company, to the Control Board for some consideration in the adjustment of the present spread. It has been already brought to your attention the many ways in which that has become depleted, during the period of time in which the Board has officiated. I wish to say that the depletion of that spread has taken place gradually, but it has been very steady and it has now reached the proportions whereby perhaps you yourself ask why it is possible, and how it is possible for us to get along with approximately 74¢ less in spread than we heretofore enjoyed.

"That has been possible, as has been brought out here today, by drastic slashes and reductions in wages of our employees, and also in other matters of cost in which we are operating. We stand today, in regard to that spread, not only 74¢ minus on our spread compared with the 1931 period, but we stand 44¢ minus compared to any other price that we ever sold to the consumer on.

"I think that in itself indicates that we have made considerable progress; that we have, as distributors or dealers, made some headway in trying to produce a better [fol. 306] unison of prices for the producer as well as the consumer. Whether or not every object has been reached in that direction, we all believe that we have made a steady progress in our efforts; but only an examination or study will bring that out, all of which I think again will be of great value to us and to the producers, and the industry as well.

"You have heard testimony here this morning from numerous dealers—dealers of different sizes and different types of business. I think they have all given you an honest picture of their conditions under which they are

operating. Improvement has been made with the producer, and the distributor has been left to work out his own problem. It is time that some consideration must be shown the distributor, or there's going to be a very drastic effect upon the very large industry which we all represent. Businesses that have heretofore enjoyed a fairly good yearly business; suddenly find themselves now in the position of not knowing which way to turn and not knowing whether they can produce sufficient income, and whether they can meet the bills that they are obligated to pay.

"Particularly that is bad at a time when we face now additional expense brought on by the needs of some con- [fol. 307] sideration for a readjustment of our labor. There can be no question but what this has got to be seriously considered, and something has got to be done. They have borne with us and worked with us on the downward trend, and they are now facing increasing costs; and they must of necessity, in order to live or make a successful operation out of the N R A, be privileged to have some additional income, or else the whole plan fails.

"The other factor is that there are things today not being done in our business which should be done. I doubt whether a large or small business can go along, as I know some of them are at the present time, without giving due consideration to their upkeep in a way that will save that rapid depreciation which usually takes place, and will take place, if not cared for.

"Pages 63-64-65

"I have prepared here, and submit for your observation and study, a form which I submitted before, and which I suggested might be available from all of the companies—which I felt even the smaller companies could produce quickly for your use. However, with the investigation or study being demanded by the Governor, I assume that you [fol. 308] might wish to take it up in a different light. Nevertheless I have covered our own company, and I am glad to hand this to you.

"Whereupon the following prepared statement was read and submitted, for the Board's information:

"Increased Cost to Distributors, per Cwt. of Class #1 Milk, due to Price Changes, Increased Labor costs, etc., since May 18, 1933

	Per Cwt.
Decreased spread to distributor because of price change by order of Milk Control Board on May 16, 1933	$.1300
Increased retail commissions due to above price change	.0095
Increased cost of unavoidable milk waste due to above change (estimated)	.0100
Increased commissions due to price change July 21, 1933	.0095
Increased cost of unavoidable milk waste due to above change (estimated)	.0100
Increased spread to distributor because of price change by order of Milk Control Board on July 21, 1933	(.1200)
Increased cost of butter-fat premiums, April to September (estimated)	.0500
Total—Net increased cost to distributor	$.0990

[fol. 309]

Increased cost due to N. R. A.	.0230
Cost of 10% increase in payroll, if made effective	.1660
Total	$.2880
Operating loss for month of July, 1933, per cwt. of Class #1 milk	.0712
Increased spread on Class #1 required to offset decreased spread, meet increased payroll costs and eliminate operating loss	$.3592

If cost of supplies increases 10%, it would require additional spread to offset the increase, amounting to $.0497 per cwt.

Anticipated operating loss in August, 1933, $.142 per cwt. of Class #1 milk.

"The Chairman: I think it likely that Dr. Spencer will prepare a form along these lines or in some other way, which he will ask the companies to use.

"Mr. Cronk: Yes, I think that may be helpful pending the examination that you have got to make. A thorough study of all of the records, especially of a company the size of ours, is going to take some time. I don't need to tell you that, as Dr. Spencer is familiar enough with it. We want to give something to you before it takes that time, because we can't wait in the present situation for that amount of time to pass by before some adjustment is made. [fol. 310] "We have labor right at our door which must be recognized, and other costs which must be considered, and therefore something in the way of an adjustment must take place if we are to continue to function to the advantage of all. I am not asking any abnormal profits; our records will show that. I don't think anyone in the business is particularly afraid of any examination of the records. If they are, we ought to know about it and get our house in order. If something can be shown to us which will be helpful, I think that is what we all need. We welcome it.

"The Chairman: In other words, scrutinizing your figures on increased cost to the distributor, your company would need 36¢ per hundred to put you back in a position where you were as of May 15th, or April 15th?

"Mr. Cronk: Yes, that's practically right. I will leave these with you for your study, and you can have them all certified or verified if you wish. Any figures I produce here I am perfectly willing and ready to swear to, and will be glad to have you substantiate them by any investigation you may make. But we are in a very bad position, Mr. [fol. 311] Chairman, and I wish to emphasize it.

"Perhaps as an industry, we have not made ourselves clear before, and I want to go on record to say that I believe we have failed in that. Perhaps we have not been impressive enough for you to give us consideration, but you have gradually taken away from us 74¢ on the spread. Now we have got to make a little noise until some consideration is shown, because it is almost essential that this big business be put upon a proper balance.

"Pages 69-70-71-72

"Mr. Cronk: I have nothing more to say at this time, unless perhaps you may wish to ask me any questions. But I am pleading with this Board for consideration. I want to say that this business can't continue the way it is and make any progress. It must have some correction.

"The Chairman:

"Q. As far as the Borden's Farm Products Company is concerned, it is operating at a loss on its Grade B business?

"A. That's right.

[fol. 312] "Q. Would you care to make any statements in regard to your operations as to fluid cream?

"A. Those are on the separate sheet you have there, and represent all of the products for July. That's a July loss covering cream and all products there. That's covered very clearly.

"Q. It's headed 'Grade B Milk.'

"A. Yes, that's right.

"Q. But it represents all your operations for Grade B?

"A. Yes, that's in the figures.

"Pages 78-79"

It is stipulated that the following letter from Dr. Leland Spencer should be read into the record as the testimony that Dr. Spencer would give if called as a witness:

"New York State College of Agriculture,

"Agricultural Experiment Station,

"Cornell University,

"Ithaca, New York

"Department of Agricultural Economics and Farm Management

"February 25, 1935.

[fol. 313] "Mr. Henry S. Manley, Hotel Commodore, New York City.

"DEAR MR. MANLEY:

"Thus far I have not been able to find a copy of the questionnaire used in the October, 1932, survey of store sales. My office has been moved three times in the past three years, and my voluminous files are very much out of order. It is my impression that we sent the questionnaires back to the New York City Department of Health after the data were tabulated.

"I know of no reason to doubt that the tables and text in the Pitcher Report, based on the store survey of October, 1932, are fairly representative of tendencies and conditions in store sales of milk in 1932 and early 1933. It is possible that the activities of Mr. G. N. Allen and his Committee may have resulted in a temporary decrease of price cutting, both in the sales of milk to stores and out of stores. However, it does not seem possible that there could have been a much greater dispersion in these prices than existed at the time of the survey, as indicated by the tables on pages 250–261 of the Report of the Pitcher Committee.

"The note on page 258 of the Pitcher Report to the effect [fol. 314] that stores supplied with the same grade of milk by more than one distributor were omitted, relates to a relatively small percentage of data. The questionnaire was in such form that as to stores selling the milk of two or more dealers, purchased at different prices, it was not always clear which price applied to which dealer. For instance, the report might be in substance that the store was buying Grade B bottled milk at seven and eight cents from two dealers which were named. In such cases, of course, I did not undertake to guess which dealer was selling at the lower price, but eliminated the report for purposes of the data noted on page 258. The elimination was not so great in volume or so peculiar in character as to affect the representative character of the table.

"If you insist upon having me as a witness, I hope I can be called on a Tuesday or a Saturday morning. Any other day will disturb my lecture schedule. Of the other days, Monday is the least inconvenient.

"Very truly yours, (Signed) Leland Spencer, Professor of Marketing.

"P. S.—The week of October 17, 1932 was selected for making the survey because it corresponds approximately [fol. 315] to the period of the survey made in the previous year for the Loose Milk Commission.

"L. S."

Defendants' Exhibit 23, being a statement made by Joseph O. Eastlack on behalf of the plaintiff at a public hearing before the Division of Milk Control on April 17, 1934, was received in evidence, over the objection of the plaintiff.

It was stipulated that the Special Master might take judicial notice of the record of the hearings before the Joint Legislative Committee of the New York Legislature for the purpose of considering the Milk Control Laws of 1933 and 1934.

MAURICE A. FITZGERALD was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I was a member of the Assembly in 1933 representing the Fifth District, Queens County. In March, 1933 subse- [fol. 316] quent to the introduction of the Pitcher Bill, the so-called 1933 Milk Control Law, before the Legislature there was a conference of both Houses in the Assembly Parlor at which both the Republican and Democratic members attended. It was the only such conference I ever heard of up to that time; there was a subsequent one. The occasion for that conference was to consider the tentative proposal of the Joint Committee on Agriculture. It was attended by all of the members of both the Senate and Assembly and was like a Joint Legislative session only it was informal instead of formal. No record was taken of the minutes of that conference.

Statements were made before the Legislators at this conference with reference to the respective positions of the independent milk dealers, the advertised milk dealers, the independent farmers and the consumers in New York City with relation to the proposed provisions of the Milk Control Law that was under consideration by the Legislature.

By the Special Master:

I made a statement to the whole body with regard to the [fol. 317] failure of the Bill as presented by the Committee on Agriculture to maintain the status quo which then existed between the advertising and the non-advertising companies. Mr. Steingut made a statement on the same subject in reply to me. I believe there was some further discussion but I cannot recall definitely who made any other statements. The Bill was then in Committee without

the differential and the provisions of the Bill were explained by Senator Pitcher at this conference. A general discussion took place. The object was to find some plan that the Legislature could agree upon. Senator Byrne informed us that the Committee itself appealed to the whole body for its advice. As to the statement which I made, I objected to the Bill as presented by Senator Pitcher, or as explained by him, on the ground that if that Bill was adopted in that form it would tend to create a monopoly. I stated what I believed to be facts, that there had existed a competition between the larger and smaller companies, that that resulted in fixing the consumer's price for the milk, and that as a result of the provisions in the Bill as then proposed that existing situation would be destroyed, and that unless some provision was made, specific so as to [fol. 318] preserve the competitive arrangement which had existed up to that time, a monopoly would exist which would eventually raise the prices to the consumers.

I have never been in the milk business; I was interested in it only for the sake of my constituents, including independent producers and dealers as well as retailers and consumers. Beyond my statement, my recollection is not so clear and I would not want to state merely what I think happened. Mr. Steingut did not take the opposite side; he replied saying that the Committee would take up the point which I had raised and give it consideration and afterwards he declared that the joint conference would recess and we would hear from the Committee further, and that apparently from the conversation of the members and from their statements the tentative Bill was unsatisfactory to the conference. That ended that conference.

We met again and at the next meeting the Bill had been amended so as to provide a differential. My recollection is that the second conference was only of the Assembly; they approved the Bill with the differential by making no objection to it. Everything else was done regularly in the two houses of the Legislature.

[fol. 319] Direct examination.

By Mr. Kramer (continued):

The speaker of the Assembly announced to the Assembly that there would be a joint conference with the Senate and requested all of the members of both parties to be present.

Since the Senators also appeared in force I presume that they arrived at it in some fashion suitable to themselves.

I do not represent in any but my official capacity as Assemblyman any of the independent dealers in New York City.

Mr. Pfeiffer objected to the introduction of all of the foregoing testimony of Mr. Fitzgerald on the ground that it was incompetent. The objection was overruled and an exception taken.

GABRIEL KOTCHER was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am a lawyer and have practiced since 1909. I have been connected with the production and sale of milk in New York City through the farm and business maintained by my father and brothers. I also represented farmers [fol. 320] in the attempt to organize them in a super co-operative in 1932.

I was present at the Joint Legislative hearing before the Senate and Assembly Committees on Agriculture on the Pitcher Bill on March 14, 1933 and I was appointed a member of the committee referred to on pages 276–278 of the minutes of that hearing. The other members of that committee were Mr. Halliday, of Sheffield Producers Association, Mr. Laidlaw, who I think represented some cooperatives up-State, Mr. Smith and Mr. Sexauer, representing Dairymen's League, Mr. Marcussen, of the plaintiff company, Mr. Wellwood, of Sheffield, Mr. Anderson and Mr. Lichtenberg, representing up-State dealers, and Mr. Sisson, the Chairman. There were one or two others whom I can't recall. There were also present Assemblymen Steingut and Smith, and Senators Blumberg, Pitcher, Hendel and Kleinfeld. They were not all in attendance at the same time; some stayed for awhile and walked out and others would come in. The committee met in Assemblyman Smith's office on March 15th and March 16th pursuant to the resolution offered by Mr. Sisson before the Joint Committee on Agriculture.

By the Special Master:

[fol. 321] Facts were brought to the attention of the meeting about differentials and that sort of thing and Legislators were present at the time. It was principally a discussion between myself and Mr. Marcussen, of the plaintiff company, on the subject of the fairness of inserting the differential between advertised and unadvertised brands of milk. I presented one side and Mr. Marcussen the other. I showed the committee that there was a custom for the unadvertised brands of milk to sell for 1¢ less per quart in stores. Mr. Marcussen said it was unfair to insert that in the law. He did not dispute the fact; he said it was unfair. He did not concede the facts; he did not discuss them. I showed the advertising campaign that was being conducted at the time by Sheffield and showed pictures where they claimed that "Vegetables could be washed but milk could not be washed."

The Special Master: I think it is desirable to find out if possible what, if any, facts were presented to the Legislature bearing on the matter of a differential, for we know that an amendment was offered, in Committee or on the floor, I don't know which, which resulted in a different law [fol. 322] from the original Pitcher Bill, and this is an indirect way of doing it, but it apparently is the only way in which we can find out how it was brought to their attention. If there had been a report of the Pitcher Committee, we could have it here. We have no such report, and we have gone rather far afield to prove what facts were brought to their attention.

My attitude is that I will permit testimony, evidence which shows that facts were presented to the Legislature on which they were enabled to act or did act. But I do not mean to admit any opinions of this or any other witness on the subject, and when he speaks about the fairness or the unfairness of it, I disregard it completely, and should be very glad to entertain a motion to strike out any statement of his opinions on any of the subjects.

Direct examination.

By Mr. Kramer (continued):

I had with me at that time copies of the advertisements of Sheffield and Borden that had appeared in the news-

papers prior to that meeting and showed those advertisements to the Legislators present at the meeting. [fol. 323] Defendants' Exhibit 25 contains 7 advertisements which I showed the meeting.

Defendants' Exhibit 25 was received in evidence.

I told the meeting with reference to the conduct of business prior to that time as between the independent and the advertised dealers selling to stores in New York City that it was well established that independent dealers were selling for 1¢ less than the advertised dealers in stores and that that had been going on for as far back as I could remember. Mr. Marcussen did not say anything about that; he did not dispute it.

There was also present Mr. Goodmote, an independent producer from Springville, who made a statement in the presence of Legislators as to the market or outlet for the sale of milk by independent producers. He said that the outlet of the independent producers was the independent milk dealers in New York City and that if the independent milk dealers had to sell their milk at the same price they [fol. 324] would lose their market, and consequently the independent producers would lose the outlet for their milk; the producers selling to the advertised brands would enjoy a gain of market, and there would be no relief to the independent producers.

There could be no agreement reached by the committee on the differential and it was suggested by the committee that the Bill go in as drafted by it and that the independent dealers and producers submit a proposed amendment for a differential to the Agricultural Committee.

By the Special Master:

I drew up a proposed amendment with reference to a differential and gave it to Senator Hendel who was a member of the Agricultural Committee. We handed him the whole Bill as we amended it and to it we appended this proposed differential that I drew up. I also worked on the other amendments that were proposed by this meeting, the principal one of which was the fixing of a minimum price to stores and consumers. That was not in the original Bill. It had a maximum to the consumer; we changed that to a minimum and where there was a minimum to pro-

ducers it was after long argument eliminated altogether. [fol. 325] There was also an amendment, on the suggestion of Mr. Sexauer, to include an exemption for Dairymen's League permitting its members to pool their milk and pay in the fashion they used to without regard to a minimum to be paid to producers under the proposed Milk Control Law.

Direct examination.

By Mr. Kramer (continued):

In connection with the amendment with respect to the differential no one went over the proposed language of the amendment at the meeting. After the meeting Mr. Marcussen and Mr. Wellwood went over it with me and they added a proviso clause providing that unadvertised milk should never be sold for less than 1¢ and so on. They also added "in bottles to stores." I had eliminated that, and they showed me that the omission was wrong, and I agreed with them that it should be that way. At the time the amendment was being drafted there were present independent producers who were members of the committee.

Mr. Pfeiffer objected to the introduction of all of the foregoing testimony of Mr. Kotcher on the ground that it was incompetent. The objection was overruled and an exception taken.

[fol. 326] Cross-examination.

By Mr. Pfeiffer:

Mr. Marcussen did not favor the differential. The exemption that was drafted to apply to Dairymen's League also applied to all cooperatives.

Our committee was not in agreement on everything at the end of these meetings; the farmers wanted a minimum to the producer as well as a minimum to the consumer, but it was so vigorously opposed by Sheffield, Borden and Mr. Halliday on the ground that it would be unprofitable and impracticable that they eliminated that, and it was afterwards restored by the Legislature. On that point the farmers opposed the Bill but rather than have no bill at all they said they would be satisfied to ride along with the dealers and see what they would do by them. With the exception of

that and the differential our committee agreed on the Bill.

The differential was opposed principally by Mr. Marcussen; Mr. Wellwood was with him but he did not take much part in the argument. I don't say that everybody else was in favor of the differential but they did not actively oppose it. At the time I drafted the differential I was representing the independent milk dealers in New York City, and also [fol. 327] farmers in various parts of the State. I was not appearing as their counsel but they knew I took an interest in attempting to organize them in 1932 in connection with other farmers up-state. I was never paid by the farmers but I was paid by the independent dealers. I was not paid for the purpose of having this particular differential inserted in the statute; I was paid generally by them to represent their interests, paid by the year.

I spent a great deal of time in Albany in March 1933 in connection with this law. I did not urge the insertion of the differential before the Legislators. I did at this meeting but not outside of it.

I have been representing the independent dealers in New York City for some years. They held meetings from time to time while the Pitcher Bill was in Committee in 1933 but I never heard of them raising a campaign fund to help get the differential into the Bill. I presented facts to the Legislative Committee. I think I know as much about the milk business as Mr. Wellwood and Mr. Marcussen; maybe more than they do. I have been in it all my life and I know as much about it today as they do.

[fol. 328] Redirect examination.

By Mr. Kramer:

Defendants' Exhibit 34 is a copy of some pages of a school book which I showed to the meeting.

I did not have an annual retainer from my association of independent dealers. I did not receive any compensation for either proposing or trying to get through any part of this legislation.

Recross-examination.

By Mr. Pfeiffer:

I was paid by the independent milk dealers for the work on this on a quantum meruit basis but not in connection with this legislation.

STIPULATION AS TO TESTIMONY OF FRANK B. HENDEL

In view of the illness of Senator Frank B. Hendel, it was stipulated that Senator Hendel would give testimony to the same general effect as the testimony of Maurice A. Fitzgerald and Gabriel Kotcher.

The defendants offered to prove that there was a differential between the prices at which known and unknown brands of condensed and evaporated milk were quoted on the market in New York City. The Special Master, over [fol. 329] the objection of the defendants, excluded the testimony on the ground that it was irrelevant. The defendants excepted.

Defendants' Exhibit 26 for identification, being a chart indicating the average prices of known and unknown brands of condensed and evaporated milk for the years 1929 to 1934, was excluded, over the objection of the defendants, and they excepted.

EMIL GREENBERG was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am the Chairman of the Special Milk Committee and also of the Consumers' Committee of the Community Councils of the City of New York, Inc. More than 25,000 consumers are represented by the Community Councils. We have frequent meetings of consumers in New York City and I would say that directly through mass meeting and per- [fol. 330] sonal contact I have met at least 2,500 consumers. These meetings were always called for the purpose of discussing milk and the hope that the poor could get it at reasonable prices.

I am very much acquainted with the difference between advertised and unadvertised brands of milk that are sold at stores in New York City.

By the Special Master:

I have had much experience with differentials. I have attended every meeting of the Milk Control Board in

Albany in order to keep in close touch with the milk situation so that we as consumers would be assured that we got milk at a reasonable price. I have had experience with the effect of a differential in my contact with other consumers and I have an opinion as to what would happen if there were no differential. If the differential were not in effect it would affect the amount of milk purchased.

Direct examination.

By Mr. Kramer (continued):

The amount of milk purchased at stores would be reduced. Consumers would lean more to the advertised brands, because when they come to the stores they may [fol. 331] not know just what the other milk is, but knowing the advertised brands of the big milk companies it would appear to me that it would be natural that they would buy them. They would buy less of the unadvertised brands but I could not estimate how much.

Cross-examination.

By Mr. Pfeiffer:

If the law permitted all milk, advertised or unadvertised, to be sold at stores at the same low price at which unadvertised milk is now sold consumption would not be lessened.

Helen M. Harris was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I am head worker of the Union Settlement. I am a consumer of milk and know very many other consumers, poor as well as rich, but more of the poor. I know the difference between advertised and non-advertised brands of milk that are sold to stores in New York City. If the differential were eliminated and all milk were 12¢ instead of 11 and 12 [fol. 332] I feel perfectly confident that in my neighborhood less milk of any variety would be consumed, and that more of the advertised would be consumed than the unadvertised.

Cross-examination.

By Mr. Pfeiffer:

If all milk were sold at 11¢, which is the price at which the unadvertised is now sold, I don't think that less milk would be consumed.

Redirect examination.

By Mr. Kramer:

Undoubtedly less milk of the unadvertised brands would be sold if they were the same price as the advertised brands.

FRANK PEER BEAL was called as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Kramer:

I have been Executive Secretary of Community Councils, Greater New York, for 10 years. About 4 nights a week I have attended meetings of consumers in New York City at which I have met from 25 to 500 consumers. The meetings are called by the local groups on matters of interest [fol. 333] to the consumer. The subject of milk sold to stores has been discussed at these meetings since 1926.

By the Special Master:

I have not had any experience on the subject of the differential outside of talking with people at these meetings. The matter of the differential has been discussed only in the last year or two. It was not discussed before the Milk Control Law was enacted in 1933. This particular question did not come up before the Community Councils prior to that time and we had no part in the discussion of whether the differential should be in the Bill or should not be in the Bill.

The main reason for our interest in milk was the change in the City's ordinance which caused bulk milk to be taken away. We felt that since that change favored the larger dealers the differential, which we believe favors the inde-

pendents, should be kept in operation. The matter was discussed after the enactment of the law only because as it was legislated everybody was discussing it and we were watching every phase of it.

Our first interest was that there should be bulk milk as [fol. 334] well as bottled milk and our second interest was that the price should be as low as practical. The reason why the price should be kept low is to have some competition, and the competition could be kept up, we believe, only as long as the independents would be able to sell 1¢ below.

Direct examination.

By Mr. Kramer (continued):

If the differential were eliminated and unadvertised milk had to be sold at the same price as the advertised brands there would be less milk purchased and the sale of unadvertised milk to stores in New York City would decrease. It would decrease to quite an extent; it is impossible to say how much.

STIPULATION RE CERTAIN EVIDENCE

It was stipulated that the Special Master might take judicial notice of the contents of the several prints of the bills which as finally enacted by the Legislature became the Milk Control Laws of 1933 and 1934. It was stipulated that the Special Master might take judicial notice of the report made by the Milk Control Board in March, 1934.

[fol. 335] Defendants' Exhibit 27 was received in evidence.

Mr. Pfeiffer stipulated that Defendants' Exhibits 26 and 27 comprised advertisements of Borden and Sheffield which appeared generally in New York City newspapers, including foreign language papers, and that Borden's radio programs were made prior to the enactment of the 1933 Milk Control Law.

[fol. 336] LOUIS H. SCHWEICHLER was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have been a milk dealer in the City of Buffalo about 40 years. I sell about 8,000 quarts a day to stores. There are other dealers selling bottled milk to stores in Buffalo among whom 5 or 6 advertised extensively and have for several years. My milk is not an advertised brand and I have continued to sell it since the enactment of the Milk Control Law. All milk is sold to stores in Buffalo at the same price.

Cross-examination.

By Mr. Kramer:

There are between 125 and 140 dealers in Buffalo of whom I should think 80 or 90 sell to stores.

MRS. ELIZABETH R. MEYERS was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

My husband and I have had a dairy farm at Baldwinsville, N. Y. for 15 years. During the past 3 or 4 years I [fol. 337] have attended various meetings of milk producers throughout the State and am familiar in general with conditions in the industry. I am a member of Dairymen's League and am familiar with the classified price plan under which milk is sold to the League and the blended price as far as the farmer is concerned. I am also familiar with the prices paid to farmers in my section who are not members of cooperatives.

At the present time my milk is going into Syracuse. At times in the past it has come to New York City; it depends on where they need the supply.

I have spent quite a little time in the last 2 years talking with farmers in New York State concerning the Milk Con-

trol Law and the differential. I know what the effect of the differential is upon the farmers. The price that we get for our milk depends very largely on the quantity of milk which we are able to sell as fluid milk, and anything which makes harder the increase in fluid distribution of course lowers the price of our milk, and the fact that we have to sell in competition with unadvertised brands at a [fol. 338] different price level makes it more difficult for us to put additional milk into Class 1. It seems to me that the differential makes a distinction between a comparatively small group which they call independent dealers and a much larger group who are organized solely for their own protection and for the protection of the industry in that we stabilize the supply of milk which comes into New York City. When I refer to an organized group I mean Dairymen's League and Sheffield Producers Association. The independents who are not in the organized groups are not sharing in the problem of surplus milk and that is one of the senses in which I say that I think that the operation of the differential is uneconomic, viewing the industry as a whole.

We ship some surplus milk in our territory to a chocolate works and when that milk is needed in New York City it is withdrawn from the chocolate works and sent down to the City. The small independent producer, the small independent dealer has no such regulation over the supply which comes into the City. We carry a surplus which may be used in an emergency and we carry it at a loss to ourselves, but it is to the advantage of the consumers in New York City for it regulates a supply to a consumption which is not even.

[fol. 339] By the Special Master:

Surplus milk never brings cost of production and yet the industry as a whole must have a surplus in order to equalize the flow into New York City. We think that the ideal would be for each producer in the Milk Shed to take his share of this additional milk which must be carried but we have never yet been able to do that.

Direct examination.

By Mr. Pfeiffer (continued):

Since the independent dealers sell practically all of the milk which they take from independent producers for fluid consumption, that is, Class 1, it means that those independent producers are not bearing the burden of the surplus.

Cross-examination.

By Mr. Kramer:

Although our milk goes to Syracuse our blended price depends on our sales in New York City as well as Syracuse; Syracuse is not a separate pool so that we are directly interested in New York City even if our own milk does not go there. I have not discussed milk conditions with independent dealers who sell to stores in New York City. During the past few years I have not endeavored to organize independent farmers as members of Dairy-[fol. 340] men's League; so far from soliciting membership, we have refused to take in any additional members because we felt we could not handle their milk at all. We had sufficient surplus to handle as it was.

If the independent producers lose their market I do not know how they would be able to dispose of their milk. There are other outlets. You could always make butter; that is the last resort. There are some creameries in our section that will take cream from anybody who wishes to ship. The independent farmers could do other things with their milk. They could feed it to the calves, feed it to the hogs. Hog prices are good.

ADOLPH F. HUEG was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am employed by the plaintiff as Superintendent of the Center Avenue Branch in Brooklyn. Before Borden took over the W. M. Evans Dairy Company in 1925 I had been

employed by Evans for 5 years. Evans sold bottled milk to stores throughout Brooklyn. They were on a par with the average milk dealer in the prices which they got for bulk and bottled milk sold to stores. I was familiar with their prices and with the prices which were charged by [fol. 341] other milk dealers and there was no differential between the price which Evans got for their bulk and bottled milk and the price which Borden and Sheffield and the other advertised brands got.

Cross-examination.

By Mr. Kramer:

I would say that between 1920 and 1925 there were 100 or more independent dealers who sold bulk and bottled milk to stores in Brooklyn. To the best of my knowledge they all sold at the same prices. There was never any difference in bottled prices until 1933 at the time of the Milk Control Board. Between 1920 and 1925 there were about 100 dealers in Brooklyn who sold bulk and bottled milk to stores.

By the Special Master:

In the case of bulk milk there might be a difference in competition, probably 10 or 20¢ on the can. That is due to competition.

Cross-examination.

By Mr. Kramer (continued):

There was not a difference in bulk prices in all cases, only when there was competition. We had to meet competition where the man went in and offered the milk 10¢ better; we probably met the price. But that was not so in all cases. Sometimes, but not very often, we got to an understanding [fol. 342] where we came back to the price again. I do not know what the experience of other companies was.

HERMAN ALLWEYER was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am now retired. I was associated with Standard Dairy Company which was taken over by Dairymen's League in 1926. I was one of the organizers of Standard Dairy and had been with it for 25 years. During that time I was familiar with conditions with respect to the sale of milk in New York City, particularly in Manhattan. Standard Dairy sold bottled milk to stores. At the time it was taken over by Dairymen's League there was no difference between the prices at which it sold bottled milk to stores and the prices at which Borden and Sheffield bottled milk was sold. That was true during all the time I was with Standard Dairy.

Cross-examination.

By Mr. Kramer:

There were about 100 dealers in Manhattan who sold bulk and bottled milk to stores in this period before 1926. As a rule all these dealers sold their bulk milk at the same [fol. 343] price as Borden and Sheffield; occasionally at certain times of the year they might have chiseled in here and there. There might have been one or two which cut the price here or there, and in order to hold your own trade you had to follow. The amount the price was cut below Borden and Sheffield varied according to competition; 10¢ on the can, a quarter of a cent on the bottle. Sometimes it was a new dress for the woman that ran the store, and all kinds of inducements. It happened mostly during the time when milk was flush in the spring of the year.

Trinity Dairy was selling bulk and bottled milk at the same price as Borden and Sheffield when I was in business. They might have been compelled occasionally, the same as we, to make an inducement of 10¢ or a quarter of a cent on a bottle, or so. I remember that I went out and offered milk as low as 80¢ a can less than the price offered to my customer by a competitor to give him a lesson and show him

that I was awake too. Competition to sell below our price came every little while when a new dealer started in.

By the Special Master:

It was one independent against another and occasionally one independent against Borden or Borden against an [fol. 344] independent. And a good many of them had to follow:

Cross-examination.

By Mr. Kramer (continued):

Levy Dairy sold at the same price as Borden and Sheffield. All the dealers that I can recall sold at the same price, at least they told me so. I would have heard from my customers if somebody else sold for less, and I would have been compelled to meet their price if it had been less than mine. I would not know if they sold for less to one or two stores but if the price for their whole output had been less I surely would have known about it. In 1925 we sold about 600 cans of bulk milk and 250 cases of bottled milk.

JOHN A. WEISENFLUH was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I am in the brewery business. I was formerly a stockholder of Clover Farms Dairy Company which was sold to Borden in 1924. It had been in the business of selling bulk and bottled milk to stores in New York City since 1891. [fol. 345] I was familiar with conditions in the milk industry in New York City prior to 1924 and I don't believe there was ever any differential in the price at which bottled milk of Borden and Sheffield was sold to stores and that of Clover Farms.

Cross-examination.

By Mr. Kramer:

About 15% of the milk of Clover Farms was sold to stores. There were considerably fewer dealers selling bulk and bottled milk in New York City in 1924 than in 1891. I

imagine there must have been between 75 and 100. Most of the wholesalers carried bottled as well as bulk milk.

JOHN CORNEHLSEN was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have been employed for 11 years by the plaintiff as a collector. Prior to that time, and until Empire Dairy was taken over by Borden, I was with Empire Dairy for 22 years in general charge of prices and transportation. Em- [fol. 346] pire Dairy did business in Brooklyn and Queens. I was familiar with the prices received by it in the sale of bottled milk to stores and with the prices received by other dealers. There was no differential between the price which Empire Dairy received and Borden and Sheffield received for bottled milk sold to stores.

Cross-examination.

By Mr. Kramer:

There was no difference on either bulk or bottled milk. I don't know how many independent dealers there were who sold bulk and bottled milk to stores in Brooklyn at that time but I would say 50. I know the prices at which they were selling to stores because you hear from the competitors and from the customers if they sell cheap. None of our customers were being sold at the same time by other independent dealers.

WALTER J. DICKSIDE was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

I have been employed by the plaintiff for about 20 years. For 3 years I have been Superintendent of the East New

York Branch which takes in half of the Brownsville section [fol. 347] of Brooklyn. I am familiar with conditions prevailing in the sale of bottled milk to stores in that section since November 1932. I engaged in the sale of milk to stores from November 1932 to the enactment of the Milk Control Law and had contact with storekeepers during that period. Prices were nearly all uniform; there was no difference between the price paid by storekeepers for the milk of Borden and Sheffield and the milk of independent dealers.

Cross-examination.

By Mr. Kramer:

I did not go around for the purpose of seeing storekeepers but occasionally on my travels I would stop in and see how things were going in the stores. In some cases small amounts of milk were sold to the same stores by independent dealers. I did not handle an awful lot of bulk milk; it was nearly all bottled business. I served about 500 or 600 stores. I would say that independent milk was also being sold in about one-quarter of the stores. All the companies were charging approximately the same prices; there was a uniform price. I am not so sure that the storekeepers sold to consumers the unadvertised bottled milk at the same price as Borden's milk. I am pretty sure they did; I think [fol. 348] the margin to the storekeeper was only a penny or so at that time. I don't recall just what the prices were but the products of the small dealers and of Borden or Sheffield or Renken would be sold at the same price. I don't know why the customer would buy bottled milk of the unadvertised brands at that time at the same price as Borden's. It is kind of hard to answer it; I would not know how to answer it. I cannot give any reason for it. I would not know what the storekeeper would do in order to push this product or what his thought might be in selling it.

Cross-examination.

By Mr. Manley:

We have had prices drop and go up at different intervals during a year throughout the milk business, according to the supply of milk.

The following telegram to Dr. Leland Spencer and his reply thereto were read into the record:

"Please telegraph your estimate number of independent producers in New York selling to independent dealers in New York City. Please give basis of estimate, eliminating independent producers in Milk Shed outside State. Your reply will be received in evidence under stipulation of counsel."

[fol. 349] "In September, 1933 approximately 13,500 producers delivered milk to New York State plants under New York City inspection but not controlled by dealers selling milk under wellknown names. In addition more than 12,000 producers delivered milk to Dairymen's League plants under New York City inspection and a part of their milk also was sold in New York City under so-called unadvertised brands. I do not think the numbers have changed much since then."

There was read into the record a statement from the affidavit of W. H. Marcussen, Vice President of the plaintiff, appearing at page 90 of the record on appeal to the United States Supreme Court to the effect that about 35,000 independent producers in the State of New York sold milk to New York City.

Defendants' Exhibit 28 was received in evidence.

JOSEPH O. EASTLACK was recalled as a witness on behalf of the plaintiff and testified as follows:

[fol. 350] Cross-examination.

By Mr. Manley:

Defendants' Exhibit 28 comprises Schedules 25, 26 and 27 of the report made by the plaintiff to Dr. Spencer at the time of the investigation of the milk dealers' spread in August, 1933. The classifications entered on these schedules are entered in accordance with the blank forms laid out by Dr. Spencer. It is noted on the first page of the full report that they covered not only the plaintiff but also the operations of Sussex Milk and Cream Company and Central Dairy Company, so they are not strictly a tabula-

tion of sales of the plaintiff only. All the business was done in the Metropolitan area but not under the Borden name. I think that it is substantially correct to say that the sales of Sussex and Central Dairy appear on Defendants' Exhibit 28 as sales to dealers or subdealers.

Plaintiff's Exhibits 9, 10 and 11 were received in evidence.

LAURANCE L. CLOUGH was recalled as a witness on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Manley:

Defendants' Exhibit 29 is a tabulation showing the quantity of sales by Borden for the months of March and [fol. 351] August, 1933 and November, 1934; the data for March, 1933 was obtained from Defendants' Exhibit 1, page 3, for August, 1933 from Defendants' Exhibit 28 and for November, 1934 from Plaintiff's Exhibits 9, 10 and 11.

Defendants' Exhibit 29 was received in evidence.

In preparing Defendants' Exhibit 30 I used the basic data which appears on Defendants' Exhibit 29 and represented it in certain percentages.

Defendants' Exhibit 30 was received in evidence.

Defendants' Exhibit 31 is also a representation in certain percentages of some of the basic data which appears on Defendants' Exhibit 29.

Defendants' Exhibit 31 was received in evidence.

STIPULATION AS TO INDEPENDENT DEALERS

It was stipulated that the following were independent dealers in New York City who were engaged in the retail milk business from 1929 up to the enactment of the Milk Control Law and who were still engaged in such business: W. M. Evans Dairy Company, Chardavoyne Dairy Company, Grandview Dairy, McKay Milk Products, Ferndale Farms and Morrisania Stock Farms.

[fol. 352] Plaintiff's Exhibit 13, being a copy of an advertisement of Morrisania Stock Farms which appeared in the February 1935 Bulletin of the Bronx County Medical Society, was received in evidence.

IRWIN KOTCHER was recalled as a witness on behalf of the defendants and testified as follows:

Cross-examination.

By Mr. Pfeiffer:

In the period prior to the Milk Control Law I sold at retail at the same price as Borden and Sheffield except for a period of 3 months from September, 1932 to January, 1933. At that time I sold 1¢ below Borden and Sheffield and that is the only time that I did sell below. I would not say I had no difficulty in selling at the same price; the amount I sold at retail was negligible.

Prior to November, 1931 Ferndale had a considerable business selling bottled milk to stores; we sold about 650 or 750 cases a day. After the report of the Loose Milk Commission we sold practically the same. We happened to be one of the dealers that held back and did not take the business away from other fellows; we just tended to our own business. The only increase we had was a few cans of bulk milk that our customers changed into bottled milk business. We made a mistake but we did not enter into competition for the store bottled business.

I have with me the records showing the prices at which Ferndale sold bottled milk to stores in the period 3 or 4 years before the enactment of the Milk Control Law. This book shows sales by weeks. It also shows the prices at [fol. 353] which sales were made. The price does not appear on every line or every page, but only when a change in price took effect.

I have also with me several drivers' route books which I took at random. If you divide the amount of money by the number of bottles you very easily arrive at the price. Take, for example, account No. 3, Friedlander. He was a 6½¢ customer. The figure opposite capital B indicates

bottled milk. The amount is $3.12. A case of milk consisting of 12 bottles at 6½¢ per case is 78¢; 4 times 78¢ is $3.12. There is nothing in this book to indicate the number of bottles or the price of each for which $3.12 was received, but this is the way the drivers in all companies keep their books; this is the established way.

I have no separate record of sales to stores. I would not say that you are unable to say at what price per bottle Ferndale sold milk to stores by examining these books. If you took time to check it, you would very easily find out.

I obtained the prices listed on defendants' Exhibit 2 from the sales book, route books, other records, prices, slips, and memoranda I had.

[fol. 354] The route books could not show the prices at which Ferndale sold bottled milk to stores any clearer to me than they now do. $3.12 is 4 cases; $3.90 is 5 cases; $2.34 is 3 cases; $3.60, there it drops to 6¢; on the 6th it drops to 6¢. Remembering conditions, as I do, it is very easy to make these checks.

Prior to the report of the Loose Milk Commission we never varied our prices of bottled milk to stores; we sold to all our customers at the same price with very few ex-

[fol. 355] ceptions. We were not in competition then with other milk dealers in our section. Our changes in price corresponded relatively to the advertised sales. All of the independents sold very close to the same price that we did; they might have got ½ a cent less. I know what the other dealers were doing but my major interest was following the larger companies and running in relation to them. There were no price wars as far as we were concerned in 1932. Prices were low but we were not engaged in any price war. The one exception was in September 1932 when we were being attacked in the country. If there was any price war at that time it was up in the country and that is what the reference in Plaintiff's Exhibit 6 is to for a short period. This exhibit was not due to any price wars in the City; it was a personal affair we had in the country. We went down and then changed our minds perhaps.

Redirect examination.

By Mr. Kramer:

Our business is about 15% retail and 85% wholesale. Most of our retail customers are friends and neighbors.

We have had the same amount of retail business for the [fol. 356] last 5 or 10 years practically. Plaintiff's Exhibit 6 was a notice sent to the retail trade only; we raised the price slightly in the stores at that time.

In preparing Defendants' Exhibit 2 I checked back as far as I could for all information, data and records that I had kept from time to time. I checked with another large company and with their prices and then checked all those, got the list of the different ones, and then checked my own records. Then I got from my personal sales record book the prices in there and they checked up with everything I had. The prices shown on Defendants' Exhibit 2 are the prices at which we sold; exceptional variations did not amount to enough to take notice of.

The sales book contains the prices at which bottled milk was sold to stores; they are marked right in there. Every time there was a change, it was marked right in it. Take, for example, January 2, 1928. There you have in blue pencil "Retail 16, wholesale 14." These notations were not put in more recently than the other writing in the book; they were put in January, 1928. They are my notations. They appear in blue or red pencil throughout the book. I have got them for ten years back. They indicate the prices at which we actually sold.

[fol. 357] After the entry of January 2, 1928 there is no other notation until there is a change in March; on the top of the page for the week ending March 4, 1928 there is the notation "Retail 16-15, wholesale 14-13." That continues on until there is another change. I made no entry every month; I did not need it.

As another example, take July, 1928. For the middle of the month there is a notation in red pencil "Retail 16, Wholesale 14." This notation was made probably during the week the change in price took place; within a day or two, sometimes a week, but during the time the figures are gone over.

These are the prices we actually received; we had only one price, the list was the received price, with very few exceptions.

By the Special Master:

The purpose of this book is for a future record, something to look back to, to refer to for comparative purposes in years to come.

Redirect examination.

By Mr. Kramer (continued):

In May, 1930, to take a third example, there is the following notation over the date: "Price change, one cent. Price [fol. 358] change, retail 15, wholesale 13." That is all it says. The way to get that is to look back at the other to see what the change is, whether it is up or down.

Over the entry August 17, 1930, there is a notation as follows: "New price, retail 16, wholesale 14." This notation, by the way, is in the handwriting of somebody else. Some of these entries were made by somebody else; it was just a matter of who had time to put them in. This book was kept every week; all the entries were made at the times referred to in the book.

This is the way in which the prices indicated on Defendants' Exhibit 2 are arrived at from the drivers' route books: Account No. 3 is a store, Friedlander by name. He uses bottled milk by the case. There is an entry there of $3.12 for the first day of the month. Knowing that he uses Grade B milk exclusively, $3.12 would show me 6-½¢ a quart. It is the only form in which route books are kept by drivers.

My testimony with reference to price wars related to my own business and not to the business of other dealers that may have cut prices at that time.

We have our own country plants. We utilize 50% or more of the milk that we purchase from farmers for other [fol. 359] than fluid purposes, that is, cream, cheese, butter and other products.

On the page referring to the week ending January 31, 1932, there is a notation in red pencil: "Take the wholesale from the retail—separate the routes." On the page for the week ending November 1, 1931, there is a notation in blue pencil: "Differential on wholesale 3¢ per quart from retail." It dropped from 2¢ to 3¢ and then it dropped to 4¢. That ties up with Plaintiff's Exhibit 6. I was making notations for future records.

Mr. Kramer: At this time I want to reserve the right until after the luncheon recess to review the records of this witness with relation to Defendants' Exhibit 2.

The Special Master: You need not reserve it at all. Go on with it now. There is nothing to reserve if you want to

take time to get it more in detail. You can do it in your own way. You seem to be almost cross-examining your own witness. He has made a very clear statement about his records, and now you want to go into it and back it up. It does not need to be backed up. We take his testimony as it is furnished here. Nobody is questioning it. And yet you go into every detailed piece of evidence made, which seems [fol. 360] to me quite wasteful of time, Mr. Kramer. You have repeatedly asked him questions as to the basis of his summary statement. I think he has answered it, to my satisfaction at least. I have no doubt as to how he got it, these figures on this Exhibit 2. I don't know why you cross-examine him about it. But you will have to do it your own way. I cannot regulate your methods. I have just announced to you how completely satisfied I am with it, and if you want to go on, go on.

JOSEPH O. EASTLACK was recalled as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Pfeiffer:

With reference to Defendants' Exhibit 31 sales for the month of August are not typical of Borden's monthly sales throughout the year. An examination from a seasonal variation viewpoint of all Borden's sales in the Metropolitan area reveals that August is the low month of the entire year and deviates downward from the monthly average to the extent of 8 to 10%. This is primarily the result of the vacation season which is particularly effective in the retail branch of the business. Defendants' Exhibit 31 purports to show that the total sales of fluid milk by Borden in November, 1934, were approximately 5% greater than for August, 1933. If you compare November, 1934, with a nor- [fol. 361] mal month there would be an increase. The month of November will average from 2 to 3% higher than the monthly average for the year based on an analysis of several years.

Plaintiff's Exhibit 11 was prepared to show the reconciliation between Borden's sales in November, 1934, and the Class 1 milk handled by Borden reported to the Division

of Milk Control in our regular monthly report for November, 1934. The total sales shown in this exhibit were 61,036,805 lbs., which figure includes not only sales to the trade but also milk pasteurized or pasteurized and bottled and sold to other dealers, milk sold from country plants to residents in local communities and milk transferred from the company's country plants to Dairymen's League country plants on a Class 1 basis. The latter figure is a very variable one from month to month. Plaintiff's Exhibit 14 is a schedule prepared by me showing the poundage per month from January, 1933, through November, 1934, of milk so transferred.

Plaintiff's Exhibit 14 was received in evidence.

The total sales of fluid milk to the trade by Borden in November, 1934, were approximately 8% less than the Class 1 milk handled by the company in that month as reported to the Division of Milk Control. That percentage difference would be very considerably increased in months in which larger amounts of milk were transferred to Dairy- [fol. 362] men's League country plants; these transfers have at times been as high as 5 and 6 million pounds a month.

Plaintiff's Exhibit 9 is an analysis and summary of all Grade A fluid milk sales of Borden in the Metropolitan area, with a comparison of such sales between November, 1929, and November, 1934. Retail sales of Grade A bottled milk in New York City in November, 1934, were 73.36% of sales in November, 1929, and in the Metropolitan area were 74.31%. All Grade A sales in November, 1934, in the Metropolitan area were 74.45% of sales in November, 1929, and all Grade B sales were 82.51%, and all Grade A and B sales were 80.25%. Plaintiff's Exhibit 10 is a tabulation substantially similar to Exhibit 9 confined to all sales of Grade B milk.

Plaintiff's Exhibit 15 was received in evidence.

Table 1 of Plaintiff's Exhibit 15 is a comparison of the total Grade A and B sales of the company in the 6 sales [fol. 363] areas named in the company's application for a 1933 license. It shows that in November, 1934, something over 1,600,000 quarts of milk were delivered to various relief agencies constituting almost 6% of the total deliveries;

if those are not included sales for the entire Metropolitan area in November, 1934, stood at 75.67% of sales in November, 1929, and if they are included sales in November, 1934, stood at a ratio of 80.25%. Excluding relief milk, sales in New York City stood at 73.85% and sales outside of New York City stood at 80.85%, or 7 points higher than in New York City.

I have tested the relation of the monthly data used in Plaintiff's Exhibit 15 with the weekly data used in previous exhibits. Plaintiff's Exhibit 16 is a reconciliation upon that basis.

Plaintiff's Exhibit 16 was received in evidence.

There is very little significance as to the 2 months for which we have now furnished monthly data as to whether weekly data or monthly data are used; for the 2 particular weeks in November, 1929, and November, 1934, the use of weekly data shows that sales of Grade B bulk and bottled quarts to stores in New York City declined less than would have been shown had we used monthly data.

Table 2 of Exhibit 15 is merely a recapitulation by type [fol. 364] of delivery, summarizing all the business at retail, wholesale or relief. Table 3 summarizes the sale of Grade B bulk and bottled quarts to stores, which is the data shown on Plaintiff's Exhibits 1, 2 and 3; this table shows the relationship of sales in each one of the sales areas that comprise the Metropolitan area and shows that in New York City such sales in November, 1934, were 71.46% of those in November, 1929, and that such sales outside New York City were 119.25% of those in November, 1929.

Throughout this 5 year period there has been a very persistent shift to stores as a source of milk, as contrasted to retail home delivery; this has been true to a greater extent outside of New York City than in the City, but it is still true throughout the Metropolitan area.

In Table 3 of Plaintiff's Exhibit 15 it is also shown that all other wholesale sales of Borden in New York City stood at 80.42% as against 71.46% in the case of bulk and bottled quarts to stores in New York City, but that such sales amounted to only 9.6% of the total as against 66-½%. When the two were combined in Table 4 on the basis of their [fol. 365] relative volumes the percentage of wholesale sales in New York City in November, 1934, was 72.48% of such sales in November, 1929.

Table 5 is merely a summary of all sales of relief milk and shows that 5.7% of all Borden sales in November, 1934 were delivered to some type of relief agency. Table 6 is a comparison of specified groups of sales by Borden with receipts of milk as reported by the United States Department of Agriculture; it shows that receipts of milk in November, 1934 were 84.65% of those in November, 1929, and this figure would ordinarily be used to represent the decline in consumption of milk in the Metropolitan area. In the same month compared in the same way Borden's sales in the Metropolitan area stood at an index of 80.25% and if relief milk is excluded they stood at an index in New York City of 73.85% and outside of the City at 80.85%; all wholesale sales in New York City, excluding relief, stood at an index of 72.48% and outside of the City they stood at 108.81%. Borden's business went up in that period outside New York City on wholesale sales some 8% due to the shifting from home delivered milk to stores as the source [fol. 366] of the family milk supply.

Table 7 shows Borden's proportion of the total Metropolitan market using the receipts of milk as reported by the United States Department of Agriculture as an index of the total business in the Metropolitan area. It shows that Borden's business in November, 1929 was 29.1% of the total and that in November, 1934 Borden's proportion of the business had declined to 27.6%. The decline of 1½% is equivalent to about 7,000,000 quarts. If all relief is excluded the proportion of Borden's business declined from 29.1% in November, 1929 to 26% in November, 1934.

Plaintiff's Exhibit 17 was received in evidence.

In Plaintiff's Exhibit 17 the effect of the differential on Grade B bottled milk to stores is shown by segregating the wholesale Grade B bulk and bottled quarts sold in New York City from all of Borden's other sales. The latter stood at 82.89% in November, 1934 as compared with November, 1929, and receipts of milk stood at 84.63%; in the sale of [fol. 367] milk to stores in New York City the decline was very much more marked as a result of the differential and the index stands at 71.46%. I believe this reflects the operation of the differential because of the fact that Borden's sales experience in every other avenue stood at approximately 83% and there is no reason to believe that Borden's

sales to stores in New York City would not also have stood at 83% had there been no differential in effect.

Mr. Kramer: I move to strike out that portion of the witness' answer to the previous question with respect to the result from the differential, and also I move to strike out the witness' last answer as being merely a hypothesis or an argument of the witness and not based upon any facts.

The Special Master: As the question to which he has given this long answer was calling for an explanation of the Exhibit 17, I will not strike it out, although it seems to me of little or no value, but it is his explanation. He was asked to give it and he has given it for what it is worth. [fol. 368] So I won't strike it out, and I will deny both motions.

Mr. Kramer: Exception.

Cross-examination.

By Mr. Manley:

I think that the Borden business is fairly comparable with the milk business in the Metropolitan area generally although Borden's total sales in New York City appear to be considerably less than what Dr. Spencer has indicated to be the relationship of New York City to the rest of the Metropolitan area. I think it quite probable that Borden's proportion of retail business is higher than that of the Metropolitan area as a whole, but I do not know how much higher. Borden's experience as to seasonal variations is very different from that of dealers generally because the seasonal variations of sales is very distinctly different in the retail field from what it is in the wholesale field. Bor- [fol. 369] den's business is about 63% retail and the balance, with the exception of 6% of relief milk, is wholesale. I do not think that relief milk should be thrown together with wholesale milk; a great part of it is not sold under the Borden name and therefore I do not think it has any bearing on the opportunity of the company to sell milk under the Borden name. Relief milk is sold in many cases near stores that are selling milk. Sales of relief milk at 8¢ a quart probably have some tendency to compete with sales in nearby grocery stores at 11¢ a quart. Purchasers of relief milk have means of knowing that it is Borden's milk in that it is delivered in Borden vehicles and the seal-

cones, which do not carry the Borden name, are delivered in cartons which carry the Borden name for the reason that we could hardly afford to handle a separate set of cartons for the special purpose of delivering relief milk. Grade A relief milk is sold in Borden bottles but it is not handled on the same basis as Grade B relief milk in sealcones. I think it is a fair assumption that the people who get relief [fol. 370] milk in the public health stations have some idea that the milk comes from Borden's plants. As I understand it, relief cards are given only to those who are so needy that they are not in a financial position to pay the regular price for milk.

I am familiar with the pamphlet, "The Demand Side of the New York Milk Market," by H. A. Ross, published as Bulletin 459 of Cornell University Agricultural Experiment Station in July, 1927. I regard that study as authoritative within the limits of the data that was secured. It was by no means a complete study of the Metropolitan area; it was a study of such dealers, the plaintiff among them, as furnished data to Dr. Ross. The study is representative as to the businesses which furnished data.

The data which appears on page 38 of this pamphlet shows that the sales of all milk and cream in the Metropolitan area for the first week in March is 96.2% in relation to the year as a whole; for the last week in March, 98.6%; for the first week in August, 104.2%; for the fifth week in August, 101.2%; for the first week in November, 97.1%; and for the last week in November, 94.9%. That indicates that the plaintiff's experience is decidedly peculiar. This is so because of a very large percentage of retail done by the plaintiff.

[fol. 371] Cross-examination.

By Mr. Kramer:

I believe that Borden pays the salaries of the clerks that dispense the milk at the public health stations. The City has as much to do with the sales made at the stations served by Borden as the stations served by any other dealer, many of whom are independent. The sale of relief milk is under the control of the Health Department which issues the relief cards.

IRWIN KOTCHER was recalled as a witness on behalf of the defendants and testified as follows:

Cross-examination.

By Mr. Pfeiffer:

On the average between 50 and 55% of the milk which we buy is used for manufacturing purposes and not sold as fluid milk. I don't think that this would be typical of the independent dealers in New York City. They have sur-
[fol. 372] pluses but I don't know whether they would run in those percentages.

In February, 1932 there was a differential of 4¢ a quart between retail milk and milk sold to stores. The main cause of that differential was that the larger companies sold milk in Brooklyn and Queens for a cent less than they did elsewhere in New York City. The second factor was that in stores they did not charge any deposit on the bottles. Those factors had an influence on the price at which we sold milk to stores and were one of the forms of competition that the larger companies indulged in. That competition continued right on through 1932. I would not call it a price war when the larger companies took the deposit off. They had a perfect right to do as they pleased and we acted accordingly. Whether it was aimed at us or not I don't know; I did not consider it such.

There was no more price war between the independent dealers in Brooklyn in 1932 than prevailed at any other period previously. Occasionally you had a store give away free milk or a new store opened and gave a few bottles of milk away, whatever he sold or whatever the dealer gave away, whatever he made up his mind to do. This has been in existence as long as I know, it has always happened and
[fol. 373] always will happen. I never knew of a feud as the result of the publication of the Loose Milk Commission's report in November, 1931. I don't interpret the situation the way Dr. Spencer did in the Pitcher Report when he said there was a price warfare going on in that period. If cheap milk is a price war, well and good. But all I know of, there was cheap milk being sold in general by everybody.

There was a wide margin in prices created by these constant conflicts. If you would not term selling bottled milk,

giving a 5¢ bottle away for nothing, if that is not war, I term that war. That was my argument at the time I put out Plaintiff's Exhibit 6, and a cent less in Brooklyn than in New York City, if that is not a conflict,—it doesn't have to be in prices, it is the manner of selling the milk, the ethics of the business. The only warfare was that carried on by the large companies.

Redirect examination.

By Mr. Kramer:

Ferndale's bulk business was very small. Its Grade A business was not even 1% of its total. The prices I paid to my producers in 1934 were: January, $1.69½, February $1.70 for part of the month and $1.65 for the other part, March $1.46, April $1.50½, May $1.50, June $1.58½, July [fol. 374] $1.63, August $1.72, September $1.77, October $1.76½, November $1.93, December $1.96. The corresponding prices for the same months received by members of the Dairymen's League were: January $1.44, February $1.43, March $1.35, April $1.30, May $1.28, June $1.33, July $1.42, August, $1.51, September $1.40, October $1.44, November $1.64, December $1.69. These prices included a certificate of indebtedness of 7¢. These are the blended prices of Dairymen's League as published and accepted throughout the industry.

Other independent dealers carry surplus. I don't think they carry it to the extent that we do but they have to carry surplus to be in business. Most all of the independent dealers that I know of and have come in contact with have surpluses and manufacture; all the reliable dealers manufacture and some of them to a greater extent than the big companies.

Recross-examination.

By Mr. Pfeiffer:

I am familiar with the statement in the Pitcher Report that the independents do not carry their proportion of the [fol. 375] burden of surplus. I don't think the Pitcher Report puts that very well because it speaks of the dealers that buy milk but forgets to mention the man that sells him the milk, after the dealer takes his milk, what he does with the balance.

STIPULATION RE EVIDENCE

It was stipulated that the Special Master might take judicial notice of a number of store advertisements or circulars evidencing the prices at which milk was sold by those stores during the period from November, 1931 to April, 1933.

Defendants' Exhibit 34 was received in evidence.

Plaintiff's Exhibits 18a, 18b, 18c and 19 were received in evidence.

RENEWAL OF MOTIONS TO DISMISS

Mr. Kramer and Mr. Manley renewed their motions in behalf of the respective defendants to dismiss the complaint on the ground that there had been a failure to prove facts sufficient to constitute a cause of action and that the plaintiff had failed to show that there was an absence of any rational basis for the support of the differential and that the plaintiff did not show itself to be damaged by the differential. The motions were denied and the defendants excepted.

[fol. 376] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE

It is hereby stipulated and agreed that the foregoing is a true statement of the evidence taken in the above entitled cause before Honorable Charles C. Burlingham, Special Master, and we hereby waive settlement thereof.

Dated, New York, N. Y., November 20, 1935.

Milbank, Tweed, Hope & Webb, Solicitors for Plaintiff. Henry S. Manley, Solicitor for Defendants Peter G. Ten Eyck and Kenneth F. Fee. Samuel Kramer, Special Assistant Attorney General.

So ordered.

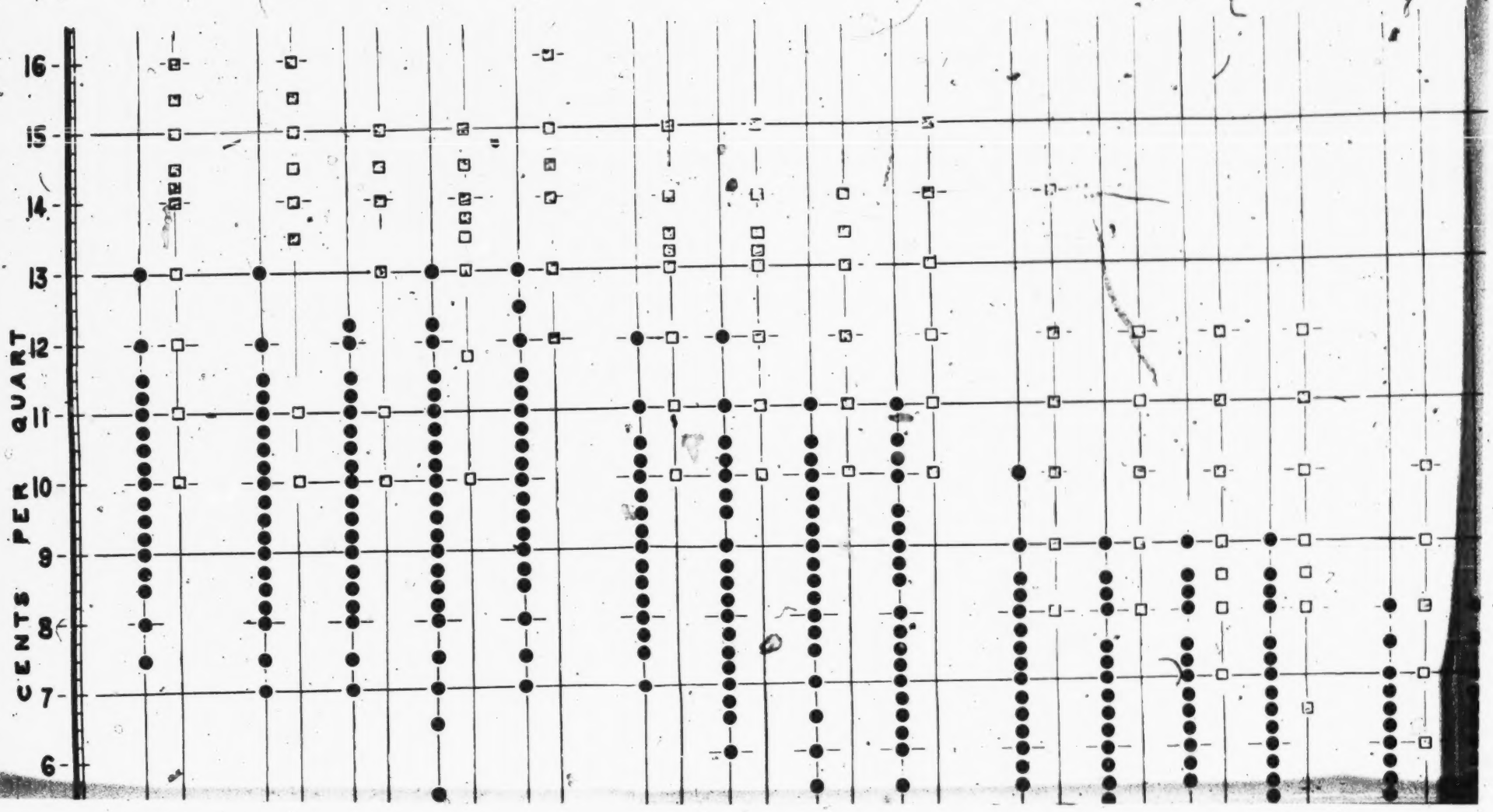
Henry W. Goddard, United States District Judge.

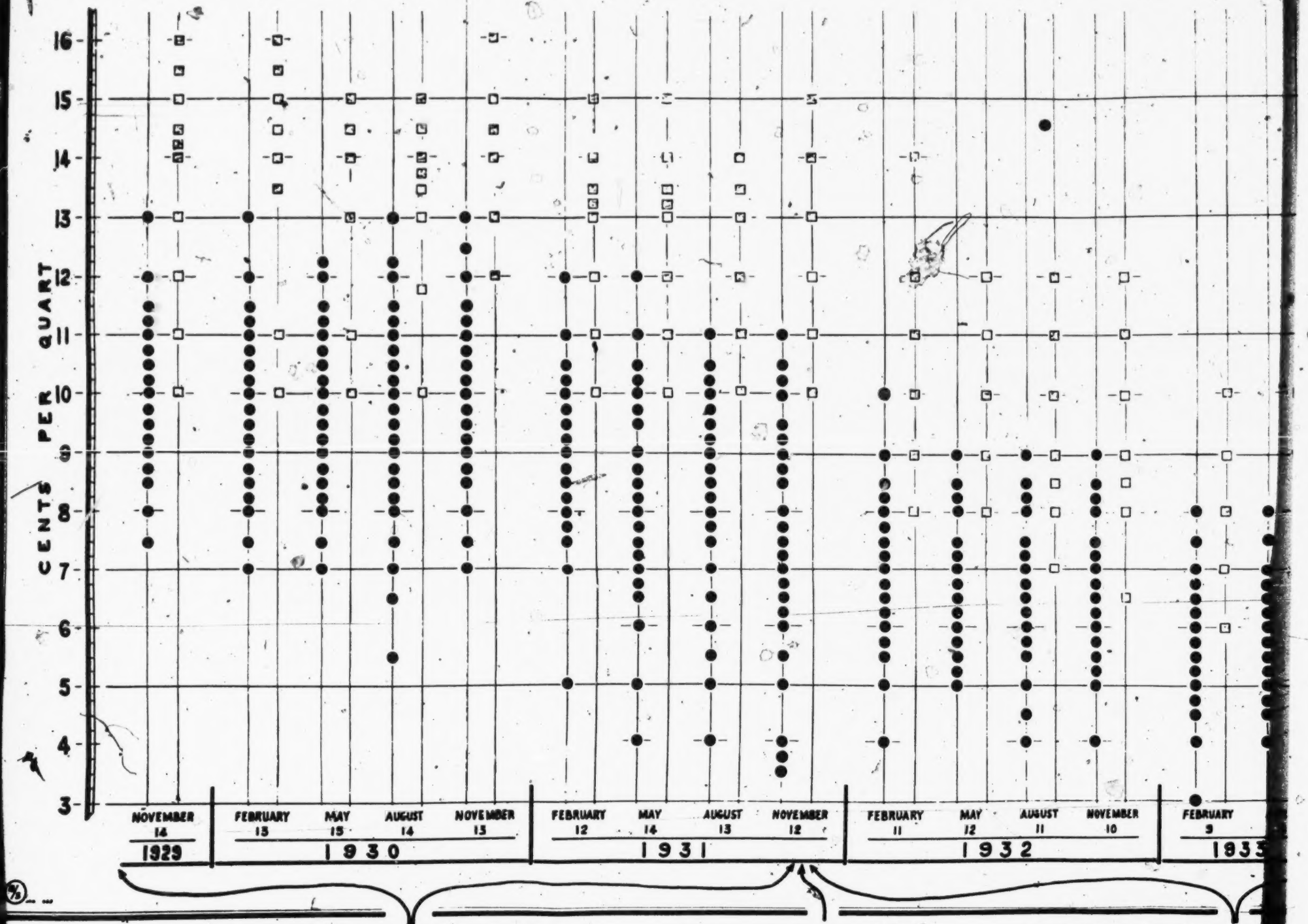
Dated, November —, 1935.

PLAINTIFF'S EXHIBIT NO. 1

BORDEN'S FARM PRODUCTS

RANGE of PRICES AT WHICH GRADE "B" BULK an
to STORES in the CITY of NE
(EXCLUDING BOROUGH of RICHMO



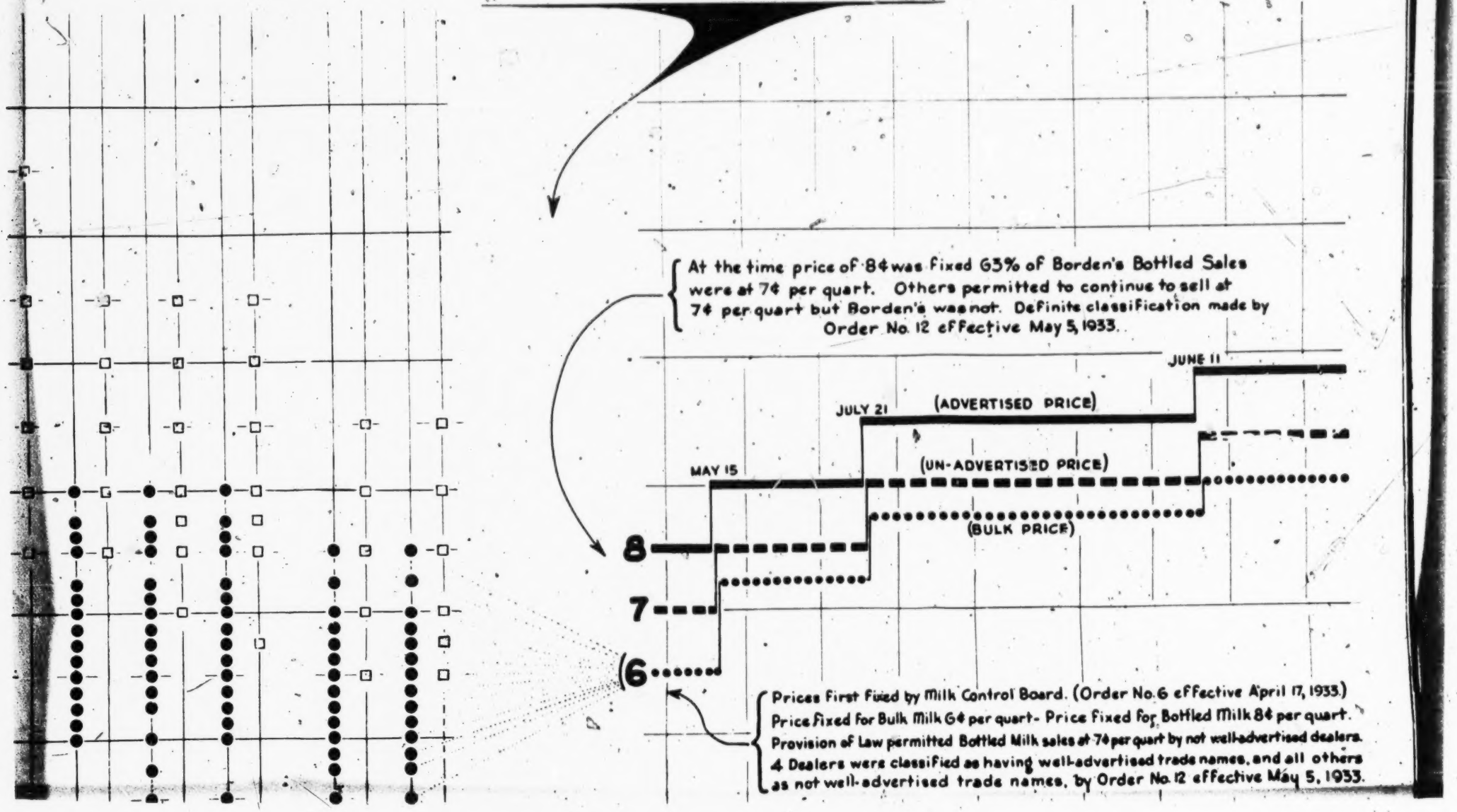

CENTS PER QUART
16
15
14
13
12
11
10
9
8
7
6
5
4
3
NOVEMBER 14
FEBRUARY 13
MAY 15
AUGUST 14
NOVEMBER 13
FEBRUARY 12
MAY 14
AUGUST 13
NOVEMBER 12
FEBRUARY 11
MAY 12
AUGUST 11
NOVEMBER 10
FEBRUARY 9
1929
1930
1931
1932
1933
Period of general sales of Bulk Milk to "Stores for Resale. Bulk Milk Field always highly competitive with wide range of selling prices to stores. Little Bottle Milk sold through stores and prices of Bottled Milk very stable.
Investigation and Report recommending abolition of sales of Bulk Milk by "Loose Milk Commission" November, 1931.
Period of conversion of Bulk M
Bottled Milk Field becoming i
cut-throat competition develo
becoming increasingly wid
chaotic and prices de

PLAINTIFF'S EXHIBIT NO. 1

5 FARM PRODUCTS COMPANY, INC.

'HICH GRADE "B" BULK and BOTTLED MILK WAS SOLD 'ORES in the CITY of NEW YORK

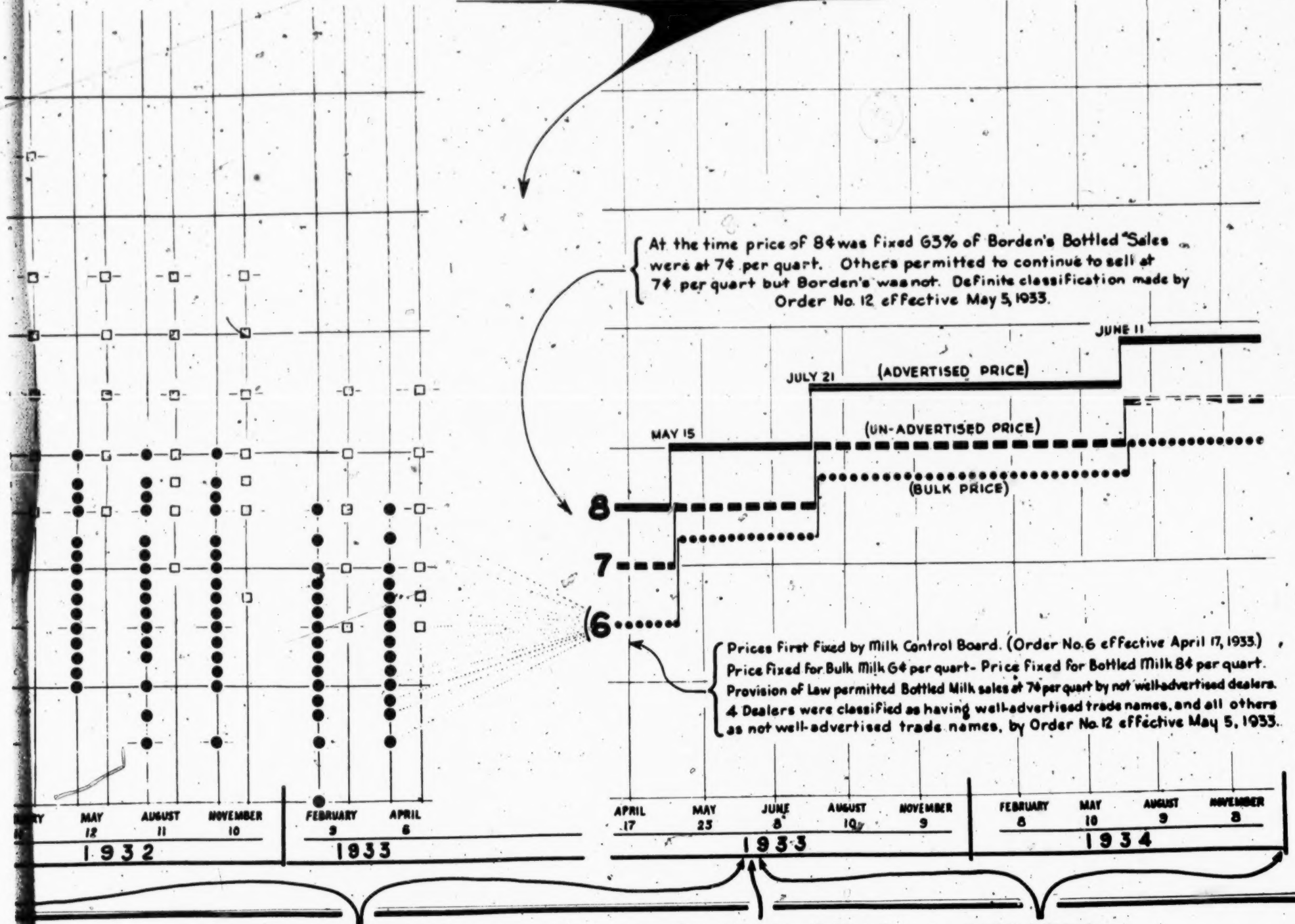
(EXCLUDING BOROUGH of RICHMOND)



(EXCLUDING BOROUGH OF RICHMOND)

Pitcher Milk Control Bill passed by Legislature and signed by the Governor April 10, 1933. to take effect immediately.

At the time price of 8¢ was fixed 63% of Borden's Bottled Sales were at 7¢ per quart. Others permitted to continue to sell at 7¢ per quart but Borden's was not. Definite classification made by Order No. 12 effective May 5, 1933.



Prices First Fixed by Milk Control Board. (Order No. 6 effective April 17, 1933.)
Price Fixed for Bulk Milk 6¢ per quart - Price Fixed for Bottled Milk 8¢ per quart.
Provision of Law permitted Bottled Milk sales at 7¢ per quart by not well-advertised dealers.
4 Dealers were classified as having well-advertised trade names, and all others as not well-advertised trade names, by Order No. 12 effective May 5, 1933.

...nding ... by ...r, 1931.

Period of conversion of Bulk Milk Sales to Bottled. Bottled Milk Field becoming increasingly unstable, cut-throat competition developing and Price Range becoming increasingly wider. Conditions very chaotic and prices declining rapidly.

Sales of Bulk Milk to Stores for "Resale to Consumers" abolished by N.Y.C. Dept. Health June 1, 1933.

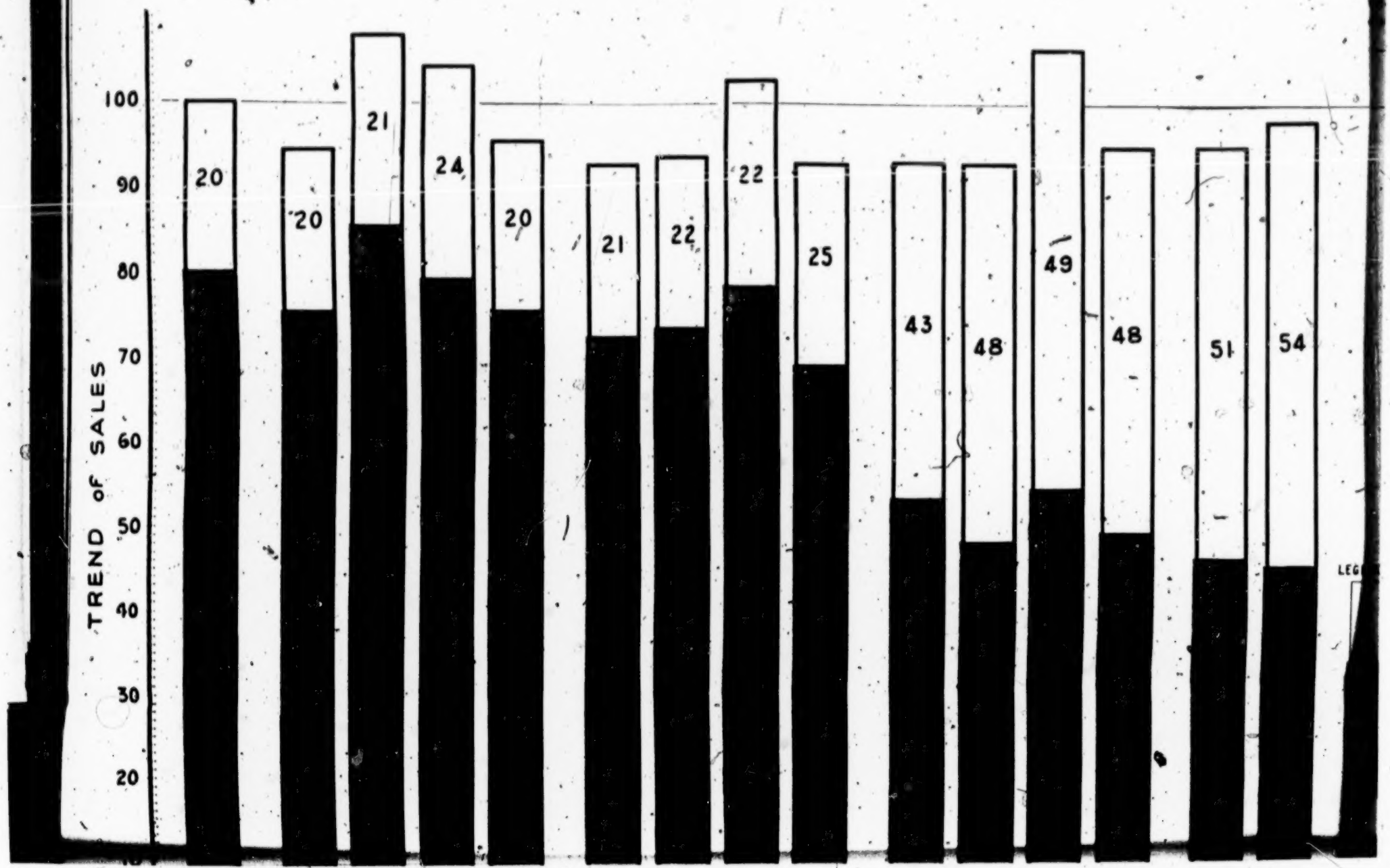
All Milk sold to stores for Resale now Bottled. Bulk Milk sold only to Restaurants, Hotels, etc.

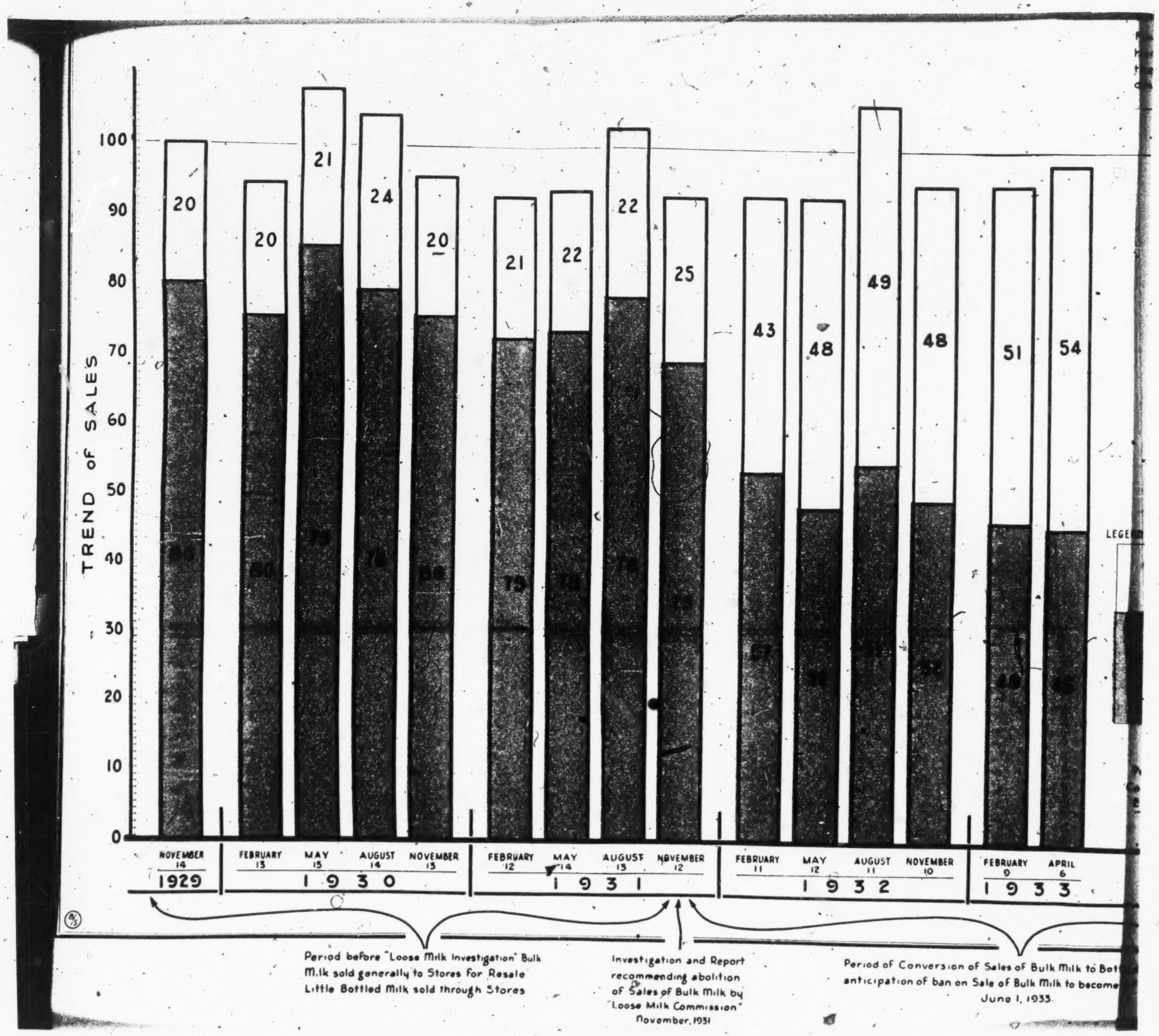
PLAINTIFF'S EXHIBIT NO. 2

BORDEN'S FARM PRODUCTS COMP

VOLUME of GRADE "B" MILK and PROPORTION of BULK c
to the STORES in the CITY of NEW YO

(EXCLUDING BOROUGH of RICHMOND)




TREND of SALES
100
90
80
70
60
50
40
30
20
10
0
20
20
21
24
20
21
22
22
25
43
48
49
48
51
54
NOVEMBER 14 1929
FEBRUARY 13
MAY 15
AUGUST 14
NOVEMBER 13
1930
FEBRUARY 12
MAY 14
AUGUST 13
NOVEMBER 12
1931
FEBRUARY 11
MAY 12
AUGUST 11
NOVEMBER 10
1932
FEBRUARY 9
APRIL 6
1933
Period before "Loose Milk Investigation" Bulk Milk sold generally to Stores for Resale Little Bottled Milk sold through Stores
Investigation and Report recommending abolition of Sales of Bulk Milk by "Loose Milk Commission" November, 1931
Period of Conversion of Sales of Bulk Milk to Bot
anticipation of ban on Sale of Bulk Milk to become
June 1, 1933.

PLAINTIFF'S EXHIBIT NO. 2

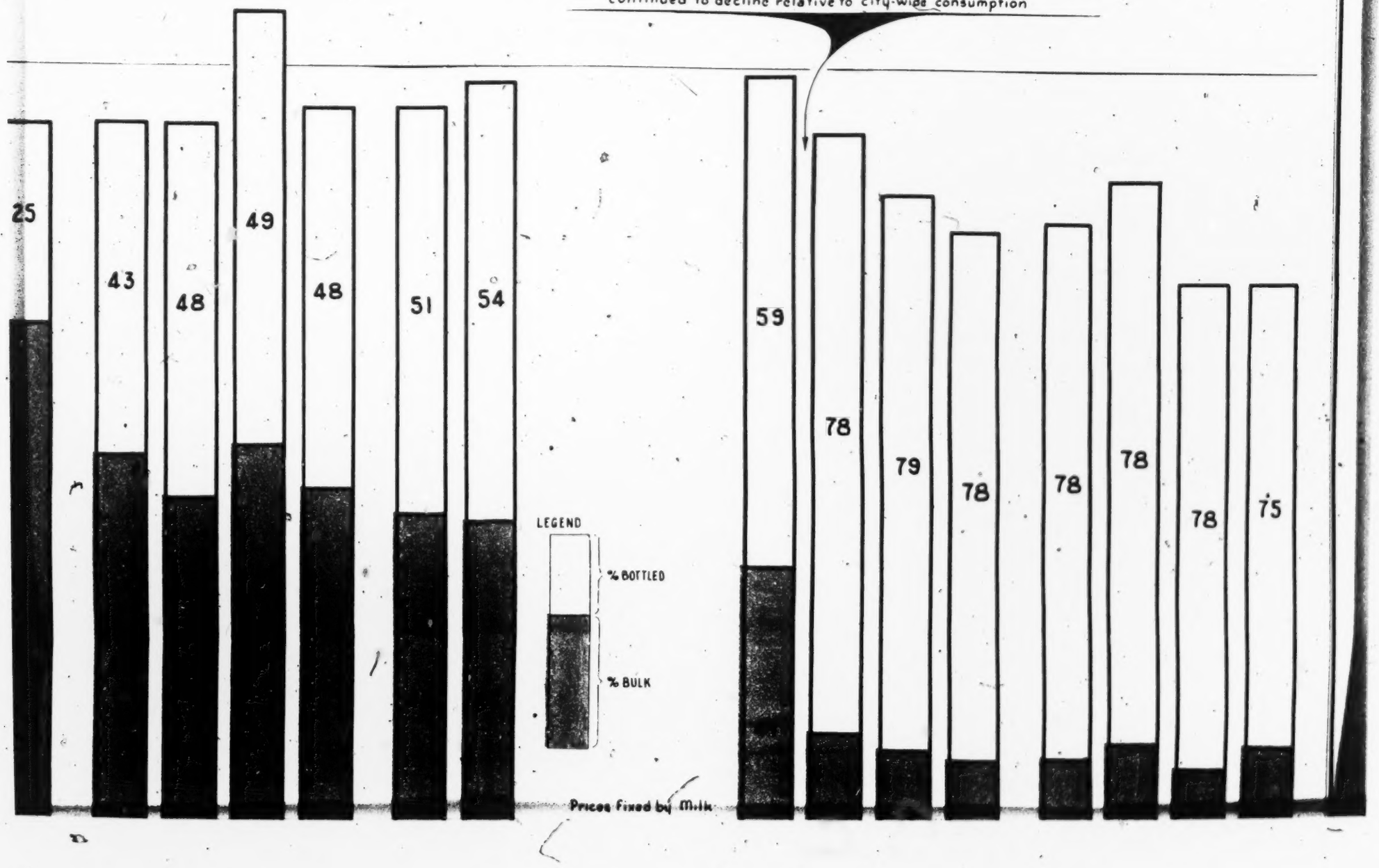
FARM PRODUCTS COMPANY, INC.

MILK and PROPORTION of BULK and BOTTLED SOLD STORES in the CITY of NEW YORK

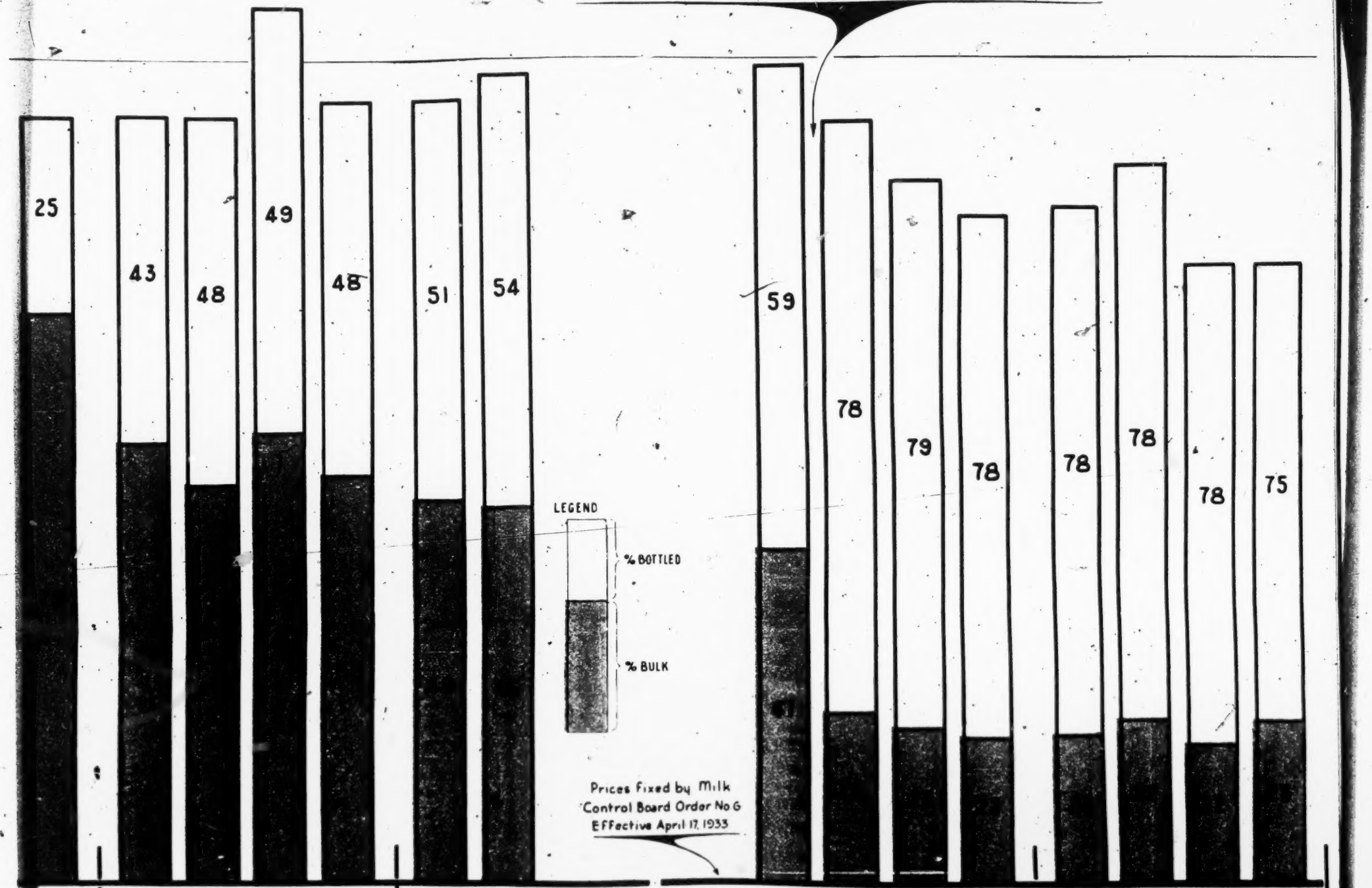
(EXCLUDING BOROUGH of RICHMOND)

June 1, 1933

Final abolition of Sales of Bulk Milk to "Stores for Resale" Wide publicity had been given to Milk prices and Borden's seriously handicapped by the 1¢ differential Borden's lost large volume of business in final day's conversion from Bulk to Bottled (May 31 vs June 1) Sales have continued to decline relative to city-wide consumption

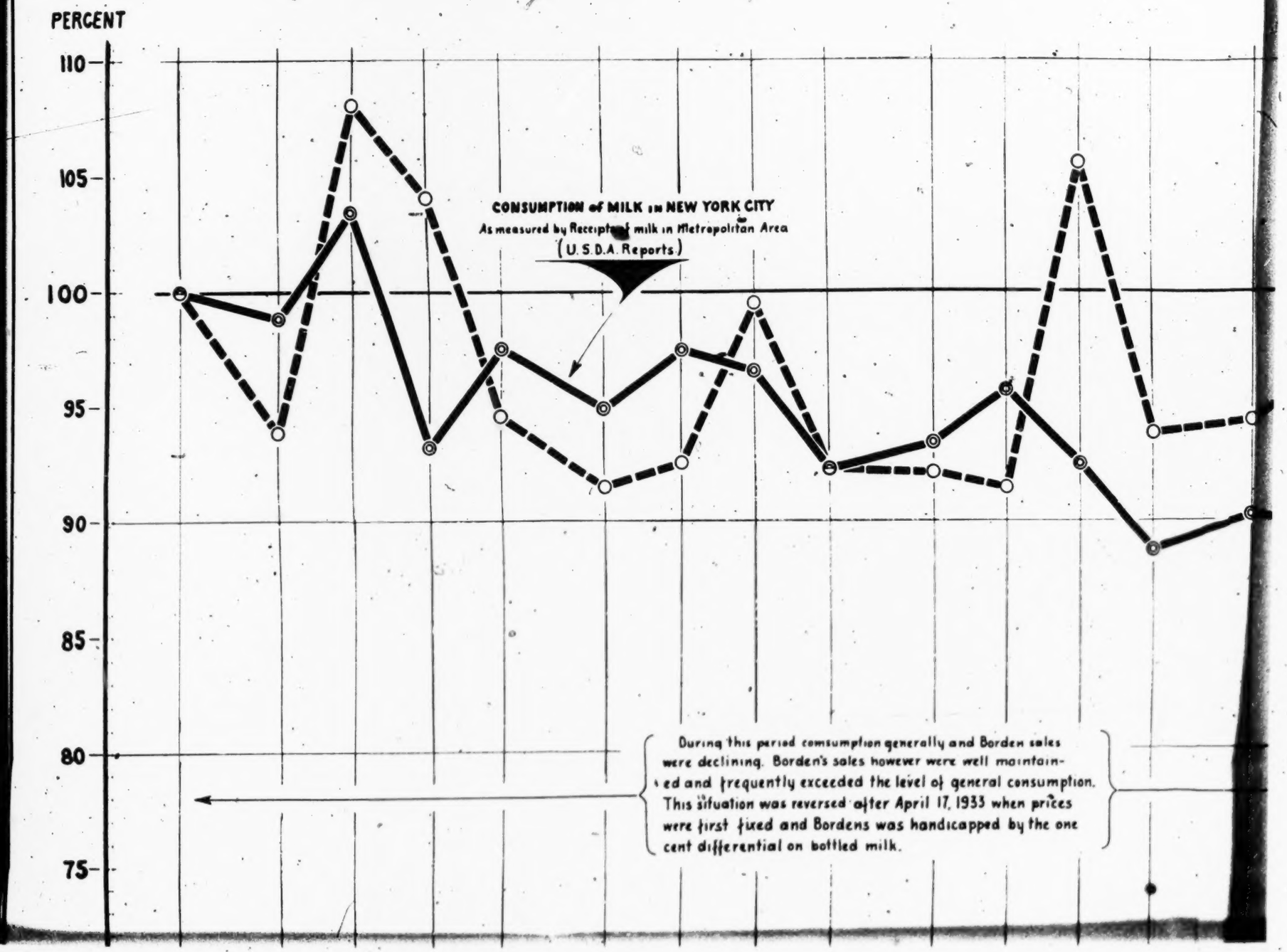


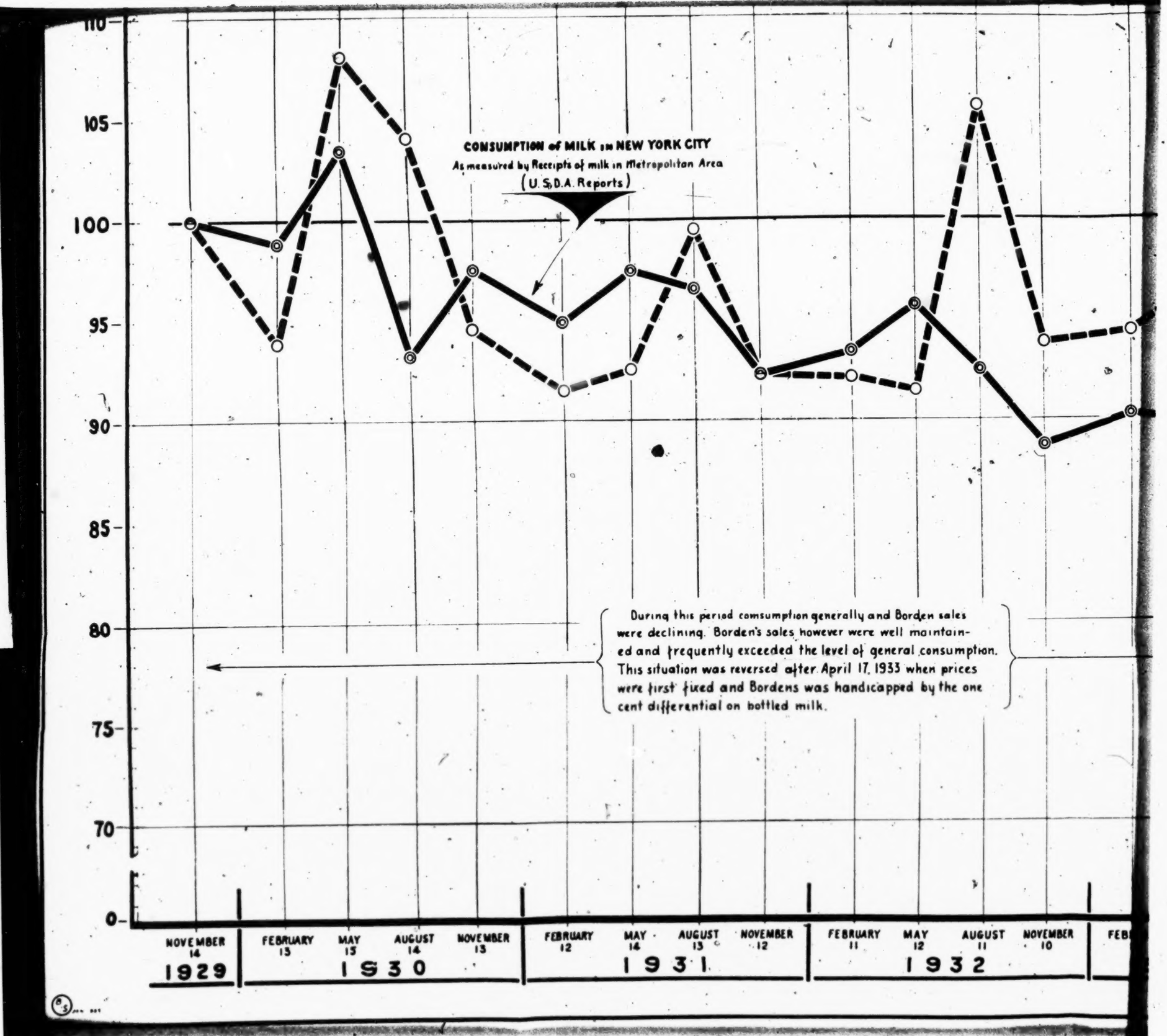
had been given to Milk prices and Borden's seriously handicapped by the 1¢ differential. Borden's lost large volume of business in final day's conversion from Bulk to Bottled (May 31 vs June 1) Sales have continued to decline relative to city-wide consumption



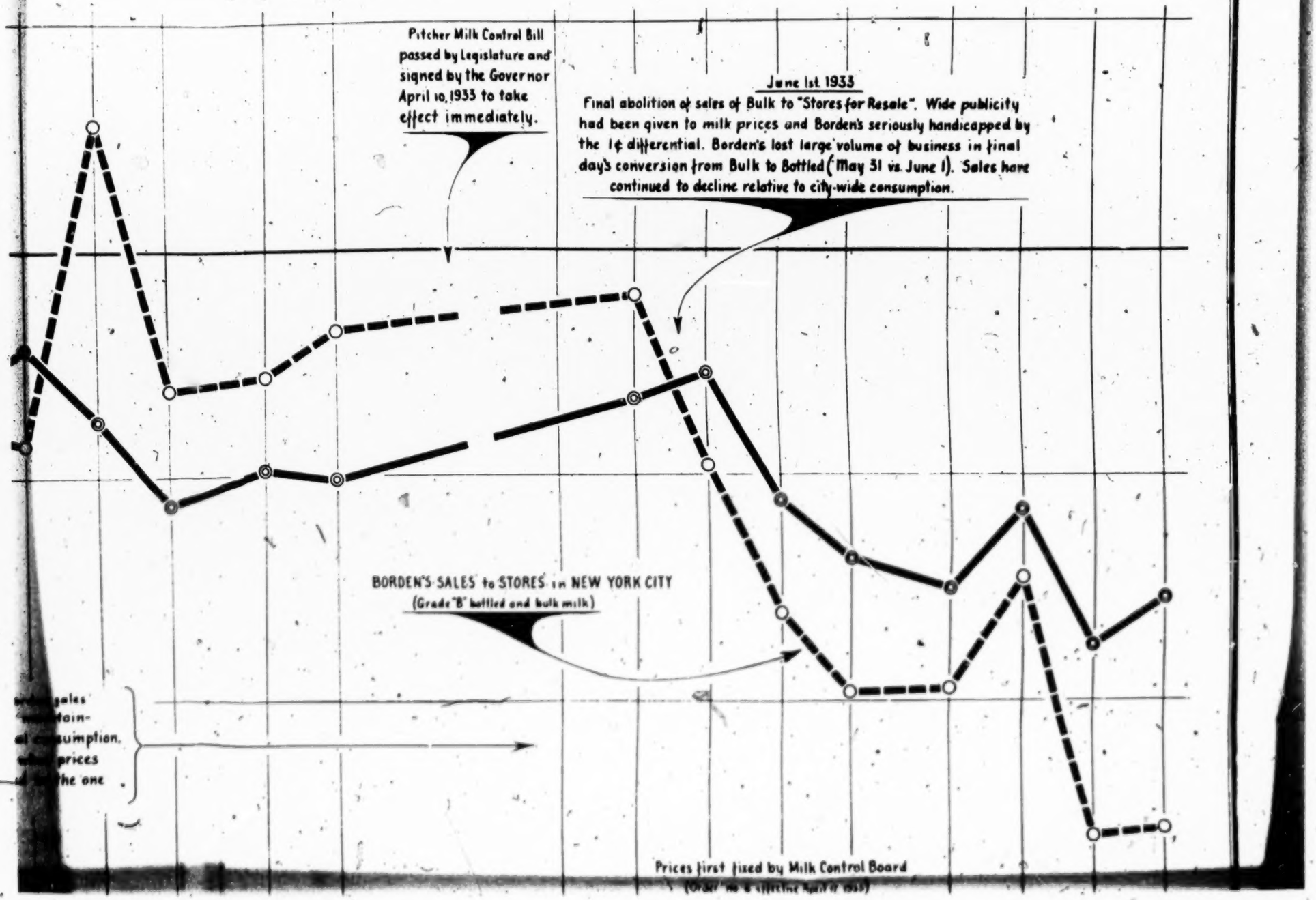
PLAINTIFF'S EXHIBIT NO.

BORDEN'S SALES to STORES compared with the GENE




CONSUMPTION of MILK in NEW YORK CITY
As measured by Receipts of milk in Metropolitan Area
(U. S. D. A. Reports)
110
105
100
95
90
85
80
75
70
0
During this period comsumption generally and Borden sales were declining. Borden's sales however were well maintained and frequently exceeded the level of general consumption. This situation was reversed after April 17, 1933 when prices were first fixed and Bordens was handicapped by the one cent differential on bottled milk.
NOVEMBER 14
FEBRUARY 13
MAY 13
AUGUST 14
NOVEMBER 13
FEBRUARY 12
MAY 14
AUGUST 13
NOVEMBER 12
FEBRUARY 11
MAY 12
AUGUST 11
NOVEMBER 10
1929
1930
1931
1932

ed with the GENERAL LEVEL of CONSUMPTION.



Pitcher Milk Control Bill passed by Legislature and signed by the Governor April 10, 1933 to take effect immediately.

June 1st 1933

Final abolition of sales of Bulk to "Stores for Resale". Wide publicity had been given to milk prices and Borden's seriously handicapped by the 1¢ differential. Borden's lost large volume of business in final day's conversion from Bulk to Bottled (May 31 vs. June 1). Sales have continued to decline relative to city-wide consumption.

BORDEN'S SALES to STORES in NEW YORK CITY
(Grade "B" bottled and bulk milk)

Borden sales
ell maintain-
eral consumption.
33 when prices
pped by the one

Prices first fixed by Milk Control Board
(Order no 6 effective April 17 1933).

MAY 12 AUGUST 11 NOVEMBER 10 — 1932
FEBRUARY 9 APRIL 6 — 1933
APRIL 17 MAY 25 JUNE 8 AUGUST 10 NOVEMBER 9 — 1933
FEBRUARY 8 MAY 10 AUGUST 9 NOVEMBER 8 — 1934

Plaintiff's Exhibit No. 4

BORDEN'S FARM PRODUCTS COMPANY, INC.

VOLUME OF GRADE "B" MILK AND PROPORTION OF BULK AND BOTTLED SOLD

TO THE STORES IN THE CITY OF NEW YORK
(Excluding Borough of Richmond)

DATA IN QUARTS BY WEEKS

	"B" BULK	"B" BOTTLED	TOTAL	PERCENT OF TOTAL BULK	PERCENT OF TOTAL BOTTLED	INDEX OF SALES
1929						
November 14th,	1,514,354	388,637	1,902,991	79.6	20.4	100.0
1930						
February 13th,	1,418,933	367,915	1,786,848	79.4	20.6	93.9
May 15th,	1,621,389	434,697	2,056,086	78.9	21.1	108.0
August 14th,	1,503,258	477,723	1,980,981	75.9	24.1	104.0
November 13th,	1,431,316	369,236	1,800,552	79.5	20.5	94.6
1931						
February 12th	1,371,975	369,849	1,741,824	78.8	21.2	91.5
May 14th,	1,380,954	378,997	1,759,951	78.4	21.6	92.5
August 13th,	1,476,191	417,260	1,893,451	78.0	22.0	99.5
November 12th,	1,318,074	438,047	1,756,121	75.1	24.9	92.3
1932						
February 11th,	1,006,195	747,637	1,753,832	57.4	42.6	92.2
May 12th,	904,123	838,402	1,742,525	51.9	48.1	91.6
August 11th,	1,018,683	990,451	2,009,134	50.7	49.3	105.6
November 10th,	936,054	848,872	1,784,926	52.4	47.6	93.8
1933						
February 9th,	878,406	917,726	1,796,132	48.9	51.1	94.4
April 6th,	851,073	986,389	1,837,462	46.3	53.7	96.6
May 25th,	758,359	1,110,423	1,868,782	40.6	59.4	98.2
June 8th,	372,001	1,350,161	1,722,162	21.6	78.4	90.5
August 10th,	340,297	1,257,986	1,598,283	21.3	78.7	84.0
November 9th,	339,903	1,189,691	1,529,594	22.2	77.8	80.4
1934						
February 8th,	331,747	1,201,570	1,533,317	21.6	78.4	80.6
May 10th,	362,147	1,265,481	1,627,628	22.2	77.8	85.5
August 9th,	306,023	1,098,854	1,404,877	21.8	78.2	73.8
November 8th,	353,386	1,059,391	1,412,777	25.0	75.0	74.2

380-382

Plaintiff's Exhibit No. 6

Due to the wholesale price wars prevailing in the milk industry and the wide margins in prices created by these constant conflicts, as well as the general economic condition existing, we are pleased to announce to our FAMILY TRADE, a decrease of one cent per quart on Grade A and the same on Grade B.

Effective TUESDAY, SEPTEMBER 20, 1932

Our high grade and quality will be maintained at these reduced prices.

Thanking you for your continued patronage, we are,

FERNDALE FARMS, Inc.

383-388

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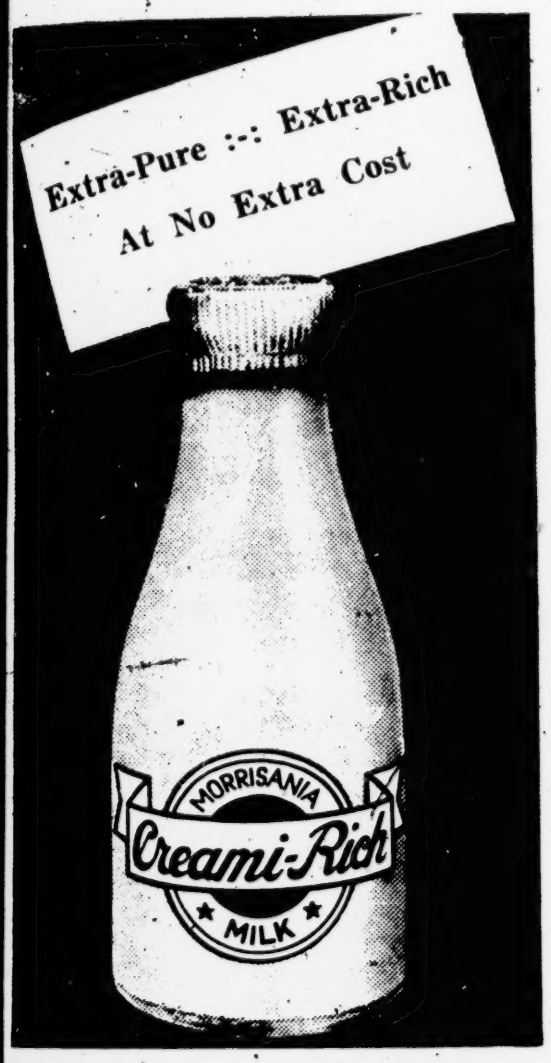
PERHAPS IT IS OUR OWN SPECIAL STANDARD OF ETHICS

. . . But Let's Just Call It "Good Business"



A Frank Statement of the Ideals and Achievements of the Oldest and Largest Independent Milk Distributor in Bronx County.

Three months ago, Morrisania announced its new Grade "A" milk, — CREAMI-RICH. Preparatory work covering two years went into the production of this milk, the larger part of which time was spent in assembling special herds of Guernsey and Jersey cattle for its exclusive production, and in equipping a special plant high in the hills of New York's great dairy country, to pasteurize and bottle this product. This plant maintains its own laboratory and veterinary staff, and is a model of sanitation and scientific efficiency.

By using milk only from these selected herds, Creami-Rich is able to maintain a distinctly higher butterfat content, and a flavor which is incomparable. The extra cream, as you will recognize, means extra vitamin potency, while the strict laboratory and veterinarian supervision, which extends even to regular cow-barn and milking equipment inspection, makes possible the utmost in sanitation with a resultant bacteria count which is only a small fraction of the Board of Health allowance.

Selling at no more than ordinary Grade "A" milk prices, the success of Creami-Rich has been immediate and gratifying.
The daily delivery service which Morrisania maintains throughout the Bronx includes, as well as Creami-Rich Grade "A", Morrisania Grade "B" and Certified milks, a full variety of other dairy products, including Sweet and Sour Cream, Creamed-Cultured Buttermilk, Cottage Cheese, Butter and Eggs. The purity and uncompromising quality for which the trade mark Creami-Rich is our symbol, is carefully and conscientiously maintained in every product which Morrisania brings to your door.

MORRISANIA has always felt that the thousands of families who depend on us for their milk supply, are conferring on us a trust which must be zealously guarded. But beyond this, we are competing in a market which is, frankly, dominated by nationally advertised producers. To succeed in such a competition, as we have succeeded (in the January just passed our sales reached an all time high) has required that we deliver a product which is demonstrably superior—which wins in that fair and final test of quality—the kitchen and nursery of the consumer.

But to you, Doctor, we may add a few pertinent facts. Morrisania milk far exceeds all the requirements of Board of Health standards. It is, and has been for years produced from tuberculin tested cattle, under the care of graduate veterinarians. Our laboratory records, both as to butterfat and bacteria count are open to your examination. Our plants, with their most modern and sanitary equipment, invite your personal inspection. And our product itself awaits your most careful and critical analysis, and comparison with any other brand.

MORRISANIA STOCK FARMS, Inc.

883 Tinton Ave., Bronx **MElrose 5-3863**

MORRISANIA
Creami-Rich
MILK

Trade Mark Registered

SERVING THE BRONX SINCE 1889

389-395

PLAINTIFF'S EXHIBIT NO. 18-C

PART III - ANALYSIS BY SPECIFIED METHODS

BORDEN'S FARM PRODUCTS COMPANY, INC.

ANALYSIS AND SUMMARY OF ALL GRADE "A" AND GRADE "B" FLUID MILK SALES IN THE METROPOLITAN AREA

DATA FOR NOVEMBER 1929, 1932, 1933 and 1934

SUMMARY OF TOTAL "A" & "B" SALES AND RELATIVE PROPORTION OF EACH

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH ITEM AS PER CENT OF ITS RESPECTIVE TOTAL			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 1.	All Grade "A" Sales	9,933,807½	8,092,418	7,015,666½	7,395,863	28.09	27.12	25.13	26.06
	All Grade "B" Sales	25,427,386½	21,750,469½	20,904,822½	20,980,436½	71.91	72.86	74.87	73.94
	Total "A" & "B" Sales	35,360,866½	29,842,887½	27,920,488½	28,376,299½	100.00	100.00	100.00	100.00

SUMMARY OF ALL "A" & "B" SALES BY TYPE OF DELIVERY AND RESPECTIVE PROPORTION OF EACH

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH ITEM AS PER CENT OF ITS RESPECTIVE TOTAL			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 2.	All Retail Sales	24,204,361½	18,598,468	17,750,906½	17,978,639	68.45	62.32	63.58	63.34
	All Wholesale Sales	11,156,484½	11,244,419½	9,784,466½	8,784,192½	31.55	37.68	35.04	30.95
	All Relief Sales	-	-	385,116	1,619,457½	-	-	1.38	5.71
	Total "A" & "B" Sales	35,360,866½	29,842,887½	27,920,488½	28,376,289½	100.00	100.00	100.00	100.00

COMPARISON OF SPECIFIED GROUPS OF SALES AND U.S.D.A. RECEIPTS WITH NOVEMBER 1929 AS 100 PER CENT

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH NOVEMBER AS PER CENT OF NOVEMBER 1929			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 3.	All Grade "A" Sales	9,933,807½	8,092,418	7,015,666½	7,395,863	100.00	81.47	70.63	74.46
	All Grade "B" Sales	25,427,386½	21,750,469½	20,904,822½	20,980,436½	100.00	85.54	82.21	82.51
	All Retail Sales	24,204,361½	18,598,468	17,750,906½	17,978,639	100.00	76.84	73.34	74.25
	All Wholesale Sales	11,156,484½	11,244,419½	9,784,466½	8,784,192½	100.00	100.79	87.70	78.74
	Total Sales-Excluding Relief	35,360,866½	29,842,887½	27,535,572½	26,756,831½	100.00	84.40	77.87	75.67
	U.S.D.A. Receipts	121,608,320	107,888,000	104,900,840	102,913,920	100.00	88.72	86.26	84.63
	All Wholesale Grade "B" Bulk and Bottled Quarts in New York City	8,180,803	8,380,487	6,838,883	5,845,650	100.00	102.07	83.67	71.46
	All Wholesale Grade "B" Bulk and Bottled Quarts Outside New York City	1,849,847	1,624,313	1,818,307	1,847,879	100.00	104.85	117.34	119.25
	All Sales except Wholesale Grade "B"	27,180,0[illegible]	21,[illegible]	21,[illegible]	26,[illegible]	100.00	96.07	99.55	98.32

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH ITEM AS PER CENT OF ITS RESPECTIVE TOTAL			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 1.	All Grade "A" Sales	9,933,807½	8,092,418	7,015,666½	7,395,863	28.09	27.12	25.13	26.04
	All Grade "B" Sales	25,427,388½	21,750,469½	20,904,822½	20,980,436½	71.91	72.88	74.87	73.94
	Total "A" & "B" Sales	35,360,866½	29,842,887½	27,920,488½	28,376,299½	100.00	100.00	100.00	100.00

SUMMARY OF ALL "A" & "B" SALES BY TYPE OF DELIVERY AND RESPECTIVE PROPORTION OF EACH

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH ITEM AS PER CENT OF ITS RESPECTIVE TOTAL			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 2.	All Retail Sales	24,204,361½	18,598,462	17,780,906½	17,972,639	68.45	62.32	63.66	63.34
	All Wholesale Sales	11,156,484½	11,244,425½	9,784,462½	8,784,192½	31.55	37.68	35.04	30.95
	All Relief Sales	-	-	360,116	1,619,457½	-	-	1.30	5.71
	Total "A" & "B" Sales	35,360,866½	29,842,887½	27,920,488½	28,376,299½	100.00	100.00	100.00	100.00

COMPARISON OF SPECIFIED GROUPS OF SALES AND U.S.D.A. RECEIPTS WITH NOVEMBER 1929 AS 100 PER CENT

	ITEM	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH NOVEMBER AS PER CENT OF NOVEMBER 1929			
		1929	1932	1933	1934	1929	1932	1933	1934
TABLE 3.	All Grade "A" Sales	9,933,807½	8,092,418	7,015,666½	7,395,863	100.00	81.47	70.63	74.48
	All Grade "B" Sales	25,427,388½	21,750,469½	20,904,822½	20,980,436½	100.00	85.54	82.21	82.51
	All Retail Sales	24,204,361½	18,598,462	17,780,906½	17,972,639	100.00	76.84	73.34	74.25
	All Wholesale Sales	11,156,484½	11,244,425½	9,784,462½	8,784,192½	100.00	100.79	87.70	78.74
	Total Sales-Excluding Relief	35,360,866½	29,842,887½	27,535,372½	26,756,831½	100.00	84.40	77.87	75.67
	U.S.D.A. Receipts	121,606,320	107,888,000	104,900,840	102,913,920	100.00	88.72	86.26	84.63
	All Wholesale Grade "B" Bulk and Bottled Quarts in New York City	8,180,803	8,360,487	6,888,883	5,848,650	100.00	102.07	83.47	71.46
	All Wholesale Grade "B" Bulk and Bottled Quarts Outside New York City	1,849,847	1,884,313	1,818,307	1,847,879	100.00	104.83	117.34	119.25
	All Sales except Wholesale Grade "B" Bulk and Bottled Quarts in New York City	27,180,063½	21,482,400½	21,091,868½	22,530,639½	100.00	79.07	77.60	82.89

BORDEN'S PROPORTION OF THE TOTAL METROPOLITAN MARKET
as Reflected by
BORDEN'S "SALES TO THE TRADE" AND U.S.D.A. RECEIPTS OF MILK

	ITEM	AREA	NO. QUARTS OF SALES IN EACH NOVEMBER				EACH ITEM AS PER CENT OF U.S.D.A. RECEIPTS IN EACH RESPECTIVE NOVEMBER			
			1929	1932	1933	1934	1929	1932	1933	1934
	U.S.D.A. Receipts	Metropolitan	121,606,320	107,888,000	104,900,840	102,913,920	100.0	100.0	100.0	100.0
TABLE 4.	Total "A" & "B" Sales including Relief	do	35,360,866½	29,842,887½	27,920,488½	28,376,299½	29.1	27.7	26.6	27.6
	Total "A" & "B" Sales excluding Relief	do	35,360,866½	29,842,887½	27,536,372½	26,756,831½	29.1	27.7	26.3	26.0
	Total "A" & "B" Sales excluding Relief	New York City	26,162,344	22,250,307½	20,119,035½	19,330,232½	21.5	20.6	19.2	18.8
	Total "A" & "B" Sales excluding Relief	Outside N.Y.C.	9,198,522½	7,592,580½	7,418,339½	7,426,599	7.6	7.0	7.1	7.2
	All Wholesale Grade "B" Bulk & Bottled Quarts	New York City	8,180,803	8,360,487	6,888,883	5,848,650	6.7	7.7	6.5	5.7
	All Wholesale Grade "B" Bulk & Bottled Quarts	Outside N.Y.C.	1,849,847	1,884,313	1,818,307	1,847,879	1.5	1.8	1.7	1.8

Footnotes:- All data on this page is taken from Part I and II tabulations for November 1929 and 1934 and for November 1932 and 1933.
These data are either direct transcriptions therefrom or combinations of details thereof in accordance with the description of items.

Plaintiff's Exhibit No. 19

BORDEN'S FARM PRODUCTS COMPANY, INC.

VOLUME OF GRADE "B" MILK - BOTTLED AND BULK SOLD

TO THE "STORES" IN THE CITY OF NEW YORK
(Including Borough of Richmond)

DATA IN QUARTS BY WEEKS

	"B" BULK	"B" BOTTLED	TOTAL
1931			
February 12th	1,379,020	379,858	1,758,878
May 14th	1,388,187	390,619	1,778,756
August 13th	1,485,251	440,419	1,925,670
November 12th	1,325,894	447,646	1,773,540
1932			
February 11th	1,010,005	758,576	1,768,581
May 12th	908,347	850,059	1,758,406
August 11th	1,026,985	1,006,541	2,033,526
November 10th	943,147	860,724	1,803,871
1933			
February 9th	885,011	930,315	1,815,326
April 6th	861,488	999,955	1,861,443
May 25th	767,074	1,126,849	1,893,923
June 8th	378,979	1,367,566	1,746,545
August 10th	351,512	1,279,108	1,630,620
November 9th	346,412	1,203,306	1,549,718
1934			
February 8th	339,582	1,214,096	1,553,678
May 10th	369,456	1,279,387	1,648,843
August 9th	313,818	1,119,749	1,433,567
November 8th	352,474	1,073,348	1,425,822

This exhibit is the same as Plaintiff's Exhibit 4 except that it includes plaintiff's sales in the Borough of Richmond. Testimony in respect of plaintiff's Exhibit 4 is in all respects applicable to plaintiff's Exhibit 19 except insofar as the testimony relates to the exclusion of the Borough of Richmond.

397-400

1928
and
1929

Wholesale & Retail Prices prevailing in Brooklyn & Queens

	Ferndale Price Grade "B" Quarts Bottled				Advertised Price Grade "B" Quarts Bottled			
	Retail		Wholesale		Retail		Wholesale	
1928								
January	16		14		16		15	
February	16		14		16		15	
March	16	15	14	13	16	15	15	14
April	15		13		15		14	
May	15		13		15		14	
June	15		13		15		14	
July	15	16	13	14	15	16	14	15
August	16		14		16		15	
September	16		14		16		15	
October	16		14		16		15	
November	16		14		16		15	
December	16		14		16		15	

Defendant's Exhibit No. 2 (Rhey 1)
Date 2/15/35 Stenographer

Defendants' Exhibit No. 2

Note:- Price of Grade "A" Quarts 3¢ higher than retail and wholesale prices shown above.

(2) Where two prices are shown in one month there has been a change in price.

1929 - Entire year same price schedule as December 1928

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1930

Wholesale & Retail Prices prevailing in Brooklyn & Queens

	Ferndale Price Grade "B" Quarts Bottled				Advertised Price Grade "B" Quarts Bottled			
	Retail		Wholesale		Retail		Wholesale	
1930								
January	16		14		16		15	
February	16		14		16		15	
March	16		14		16		15	
April	16		14		16		15	
May	15		13		15		14	
June	15		13		15		14	
July	15		13		15		14	
August	15	16	13	14	15	16	14	15
September	16		14		16		15	
October	16		14		16		15	
November	16		14		16		15	
December	16	15	14	13	16	15	15	14

Defendant's Exhibit No. 2 (after v) 1935 Stenographer

Note: (1) Price of Grade "A" Quarts 2/ higher than retail and wholesale prices shown above.

(2) Where two prices are shown in one month there has been a change in price.

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Wholesale & Retail Prices prevailing in Brooklyn & Queens

	Ferndale Price Grade "B" Quarts		Advertised Price	
~~1931~~ 1928	Retail	Wholesale	Retail	Wholesale
January	15	13	15	14
February	15	13	15	14
March	15	13	15	14
April	15	13	15	14
May	15	13	15	14
June	15	13	15	14
July	15	13	15	14
August	15	13	15	14
Sept.	15	13	15	14
October	15	13	15	14
November	14	11	14	12
December	12	9	12	10

(sheet 3)

Defendant's Exhibit No. 2 for Ident.

Date 2/17 1935 Stenographer

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1932

Wholesale & Retail prices prevailing in Brooklyn & Queens

	Ferndale Price Grade "B" Quarts Bottled			Advertised Price Grade "B" Quarts Bottled	
	Retail		Wholesale	Retail	Wholesale
1932					
January	12		9	12	10
February	12		8	12	10
March	12		8	12	10
April	12		7½ **	12	9 **
May	12		7½ **	12	9 **
June	12		7 **	12	9 **
July	12		7 **	12	9 **
August	12		7 **	12	9 **
September	12	11*	7¼ **	12	9 **
October	11		6½ **	12	9 **
November	11		6½ **	12	9 **
December	11		6½ 6 *	12	8½ **

Borenuan's Exhibit No. 8 for Identification
Date 1933 Stenographer

* On Sept. 30th, for special reasons there was a drop of 1¢ on retail, below the advertised brands and continued 1¢ below until January 24th, 1933. On wholesale (price to stores) an attempt was made to raise the price 1¢, which lasted for only a short while.

** During this period the larger companies had two prices. The price given is the approximate average of the two.

The price in Brooklyn and Queens was 1¢ lower than in the other boroughs.

Note: Borden & Sheffield removed their deposit on bottled milk to stores during this year.

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1933

Wholesale & Retail prices prevailing in Brooklyn & Queens

	Facendale Price Grade "B" Quarts Bottled		Advertised Price Grade "B" Quarts Bottled	
	Retail	Wholesale	Retail	Wholesale
1933				
January	10	6	10	7½ **
February	10	6	10	7½ **
March	10	6	10	7½
April	10	6	10	7½

About the middle of April the Milk Control Board established prices for advertised and non-advertised brands.

** See 1932 for notes.

405-422

SELLING PRICES TAKEN FROM DEALERS' APPLICATIONS

COMPANY	CUSTOMERS	ITEM	1933 March Price Per Qt.	Date of last change	Price Before Last Change Per Qt.
Samuel Adler Inc.	Store & Rest.	B. Bott.	.06	4/17/33	.06
		B. Bulk	.05	"	.05
Alexander Dairy Co. Inc.	" "	B. Bott.	.07	"	.06
		B. Bulk	.06	"	.05
		probably reversed			
Allis Dairy Co. Creed	Store	B. Bott.	.05	4/1/33	.0509
		B. Bulk	.0284	3/1/33	.02725
Alps Milk Co. Manhattan	Store & Rest.	B. Bott.	.06	2/17/33	.07
		B. Bulk	.05	"	.06
Amity Dairies Inc. Manhattan	Rest.	B. Bott.	.07	4/17/33	.07
		B. Bulk	.059	"	.053
A Balsam Queens Corona Park	Stores	B. Bott.	.06	"	.06
		B. Bulk	.05-.06	"	.05-.06
Beakes Dairy Manhattan	-	B. Bott.	.07	1/23/33	.08
		A. Bott.	.11	"	.13
		B. Bulk	.06	"	.07
Bellach Farms Inc. Brooklyn Queens	Stores	B Bott.	.06	1/24/33	.07
		B Bulk	.05	"	.06
Jacob B[illegible] Queens Cheshire	Stores & Rest.	B Bott.	.06	4/17/33	.06
		B Bulk	.055	"	.055
[illegible] Buyer Queens Macfarth	" "	B Bott.	.06	"	.06
		Bulk	.055	"	.055
[illegible] Manh.	Wholesale	A Bott.	.11	1/[illegible]/33	.12
		B Bott.	.09	"	.08[illegible]
		A Bulk	.08	"	.09
		B Bulk	.06	"	.07
Cato Creamery	Stores & Rest.	B Bott.	.06	4/24/33	.07
		B Bulk	.05	"	.047
Comer Dairy Co. Manh.	" "	A Bott.	.09	---	---
		B Bott.	.06 to .08	2/18/33	.07 to .08
		B Bulk	.05	1/24/33	.06
Co[illegible] Inc. Manh.	Store	B Bott.	.06	3/1/33	.07
	Rest.	B Bulk	.05	"	.055
Co[illegible] Prod. Kings Co. Bal.	Stores	B. Bott.	.06	4/17/33	.06
		B. Bulk	.05	"	.05
Eastern Farm Prod.	Stores	A Bottl.	.09	4/17/33	.09
		B Bott.	.058	"	.058
		Bulk	.05	"	.05
Eisenberg Farms Inc.	Stores	A Bott.	.10	"	.10
		B Bott.	.06	"	.06
		B Bulk	.05	"	.05

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Defendants' Exhibit No. 15

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COMPANY	CUSTOMERS	ITEM	1933 March Price Per Qut.	Date of last change	Price Before last Change Per Qut.
Ferncale Farms Inc.	Stores	B Bott.	.06	4/17/33	.06
		B Bulk	.05	"	.05
Gimmel Farms Queens	Stores & Rest.	B Bott.	.06	"	.06
		Bulk	.05	"	.05
Gimple Bros.Inc. Queens	" "	B Bott.	.06	"	.06
Queens Forest Hills		Bulk	.055	"	.055
Glendale Farms	Stores	A Bott.	.11	--	--
		B Bott.	.06	1/23/33	.07
		B Bulk	.0495	"	.055
Gold Medal Farms Bronx	Stores & Rest.	B Bott.	.058	4/17/33	.063
		Bulk	.051	"	.051
Grandview Dairy Queens	Stores	A Bott.	.11	--	.11
	"	B Bot.	---	--	.10
	Rest.	B Bott.	---	--	.10
Redgwood Kings	Stores & Rest.	Bulk	.055	--	.055
Hegeman Farms Corp.	Stores & Rest.	A Bott.	.10	4/17/33	--
		B Bott.	.06	"	--
		Bulk	.05	--	--
Highland Farms Manhattan	Stores	B Bott.	.06	4/17/33	.06
		Bulk	.0585	"	.0585
Holland Farms Bronx	Stores & Rest.	B Bott.	.06	"	.06
		B Bulk	.049	"	.05
Ideal Farms	" "	B Bott.	.06	None	--
		Bulk	.05	--	--
Jetter Dairy Co.Inc.	Stores	B Bott.	.06	1/21/33	.065
	Rest.	" "	.074	"	.08
Queens	Stores & Rest.	B Bulk	.055	"	.06
Juniper Valley Dairy	Stores	B Bott.	.055	No Change	
		Bulk	.0501	No Change	
A & H Korsten Bronx	Stores & Rest.	B Bott.	.07	No Change	
		bulk	.055	No Change	
K. Koslow & Son	" "	A Bott.	.11	12/5/32	.12
		B Bott.	.07	"	.08
		B Bulk	.06	"	.07
Liberty Farms Brooklyn	Stores	B Bott.	.06	4/17/33	.06
		B Bulk	.04875	"	.04875
Lincoln Farms Brooklyn	Stores & Rest.	B Bott.	.06	"	.06
		B Bulk	.05	"	-
Linden Farms Brooklyn	Stores	B Bott.	.06	-	-
		Bulk	.055	-	-
Local Milk Prod.	Stores	B Bott.	.065	2/10/33	.07
	Stores & Rest.	B Bulk	.05	1/23/33	.065

424

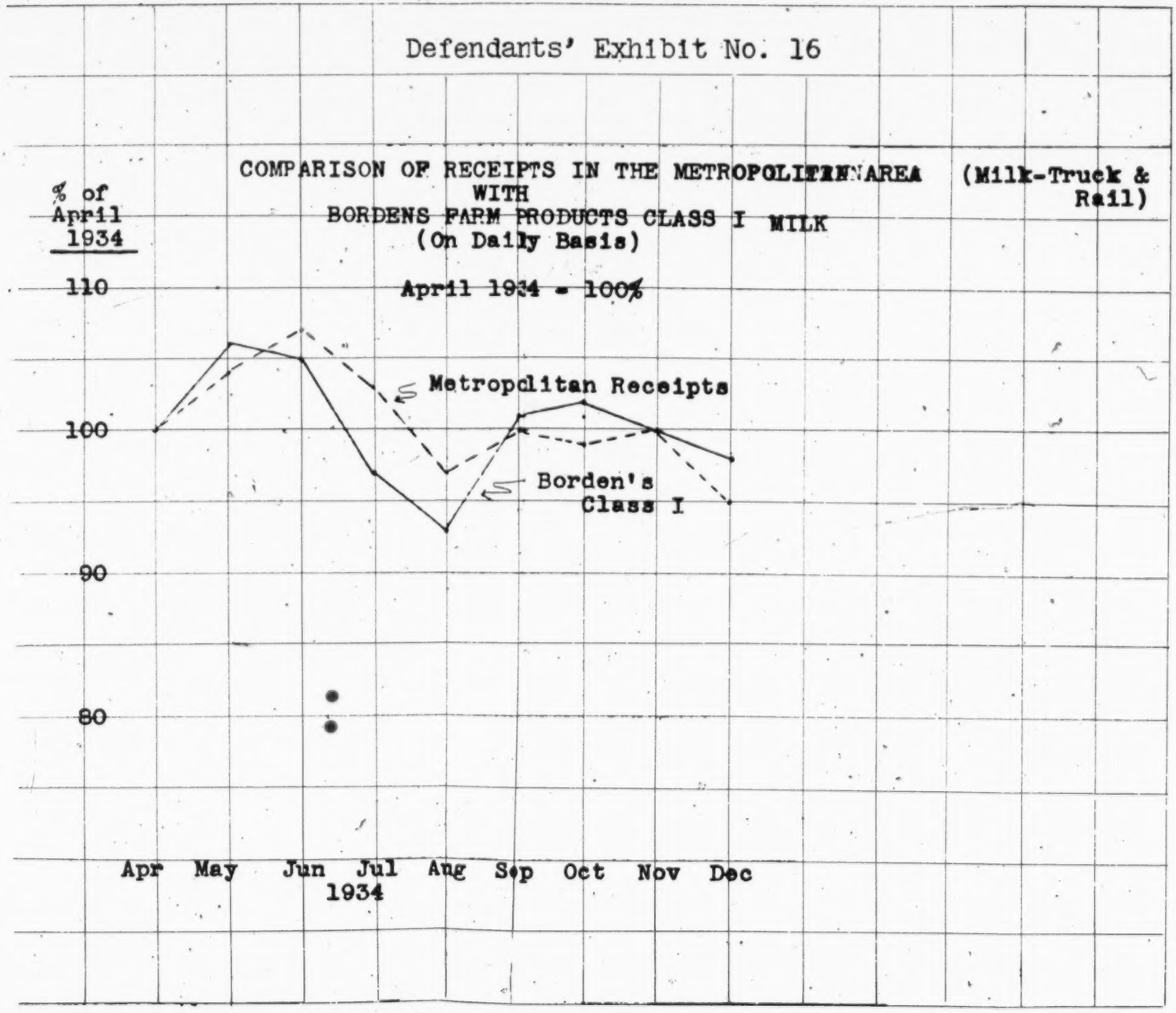
COMPANY	CUSTOMERS	ITEM	1933 March Price Per Qt.	Date of last change	Price Before Last Change Per Qt.
Manchester Cream Co. (Fancy)	Stores	B Bott.	.07	1/23/33	.08
		B Bulk	.06	"	.07
Meridale Dairies (Manhattan)	Stores	A Bott.	.086	"	.10
	"	B Bott.	.07	"	.08
	Restaurants	A Bott.	.096	"	.11
	"	B Bott.	.059	"	.069
		B Bulk	.056	"	.0675
		A Bulk	.074	"	.111
Morrisania Stock Farms	Stores & Rest.	A Bott.	.11	"	.12
		B Bott.	.07	"	.08
		B Bulk	.0575	--	--
Muller Dairies (Queens)	Stores	B Bott.	.07	"	.08
		B Bulk	.06	"	.07
O'Neill Milk & Cr. Co. (Manhattan)	--	B Bott.	.06	4/17/33	.06
		B Bulk	.045	"	.045
Prudential Milk Co. (Manhattan)	Stores	A Bott.	.11	January 1933	.11
		B Bott.	.06	"	.08
(Queens Nassau Suffolk)		B Bulk	.05	"	.06
Queens Farms Dairy Inc.	Stores	B Bott.	.06	4/17/33	.06
		Bulk	.05	"	.05
M.H. Renken (Brooklyn Queens Westchester)	Stores & Rest.	A Bott.	.11	1/24/33	.12
		B Bott.	.08	"	.08
		B Bulk	.06	1/2/33	.07
Richfield Farms (Bx)	Stores & Rest.	B Bott.	.09	4/10/33	.10
		Bulk	.055	"	.06
Est. of J.E. Rosasco (Manhattan)	"	B Bott.	.07	1/23/33	.09
	"	B Bulk	.05	"	.07
Sacks Dairy Co. (Brooklyn)	Stores	B Bott.	.07	12/4/32	.08
	"	A Bott.	.0982	--	--
	"	B Bulk	.0488	--	--
(Manhattan Queens)	Rest.	B Bulk	.0483	--	--
Schwartz Milk Co.	Stores	B Bott.	.06	4/17/33	.06
		Bulk	.05	"	.05
Sheffield Farms	Wholesale	A Bott.	.11	12/5/32	.12
		B Bott.	.08	"	.09
		A Bulk	.08	"	.09
		B Bulk	.06	"	.07
Shirben Farm Prod. Co. Inc. (Bklyn)	Stores	B Bott.	.06	4/17/33	.06
		Bulk	.05	"	.05
Sunshine Farms (Manhattan)	Stores	A Bott.	.10	--	--
		B Bott.	.06	2/10/33	.07
(Bklyn)		Bulk	.05	--	--
Tilden Farms Inc.	Stores	B Bott.	.055	4/17/33	.055
		B Bulk	.05	"	.05

425

COMPANY	CUSTOMERS	ITEM	1933 March Price Per Qt.	Date of last change	Price before last change Per Qt.
Triangle Farms Inc.	Stores & Rest.	B Bott.	.061	1/23/33	.07
		B Bulk	.054	"	.0625
Trinity Dairy	" "	B Bulk	.05	2/17/33	.05
Vernonville Farms	Stores	B Bott.	.06	1/23/33	.09
		Bulk	.054	"	.065
Sam Weinstein	Stores	B Bott.	.06	Feb.1933	.07
		B Bulk	.05	"	.06
Weisglass Dairies Inc.	Stores	B Bott.	.07	1/23/33	.09
		A Bott.	.12	"	.14
	Stores & Rest.	B Bulk	.06	--	.14
Whitehouse M &C. Co.	" "	BBott.	.06	1/23/33	.07
		B Bulk	.05	"	.06
York Dairy Co. Inc.	Stores	B Bott.	.06	4/17/33	.06
	"	B Bulk	.05	"	.05

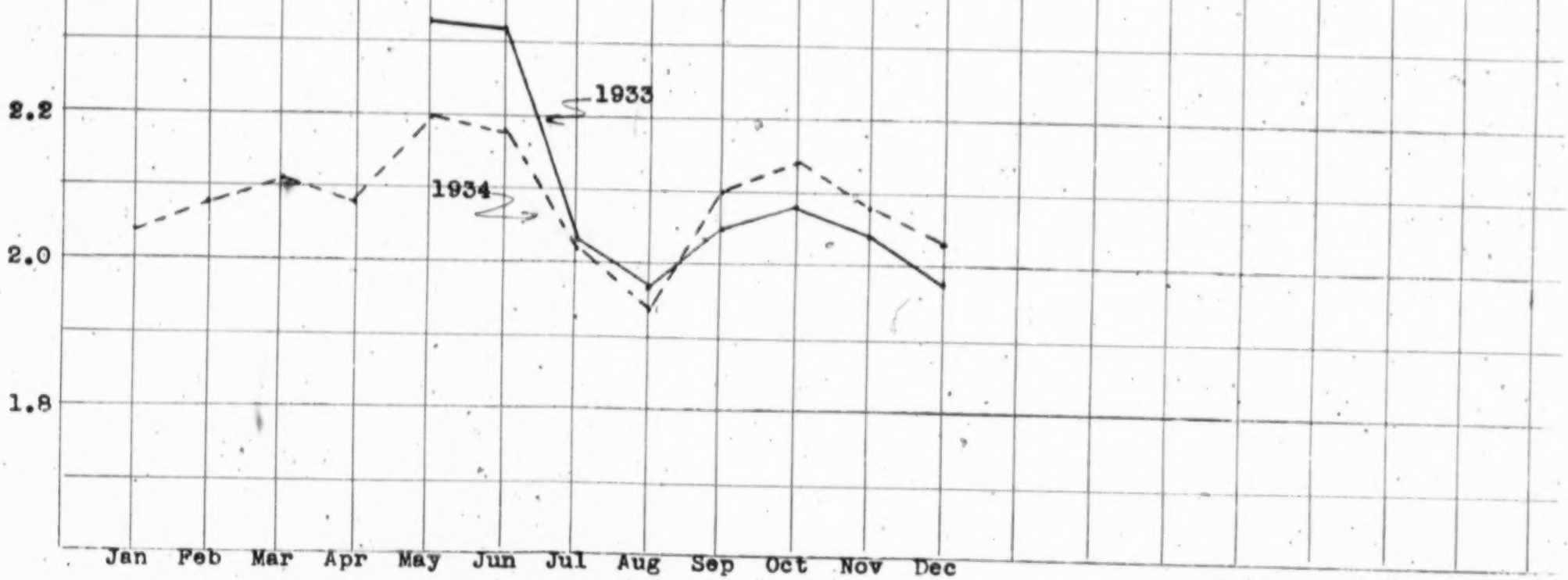
426

Defendants' Exhibit No. 16

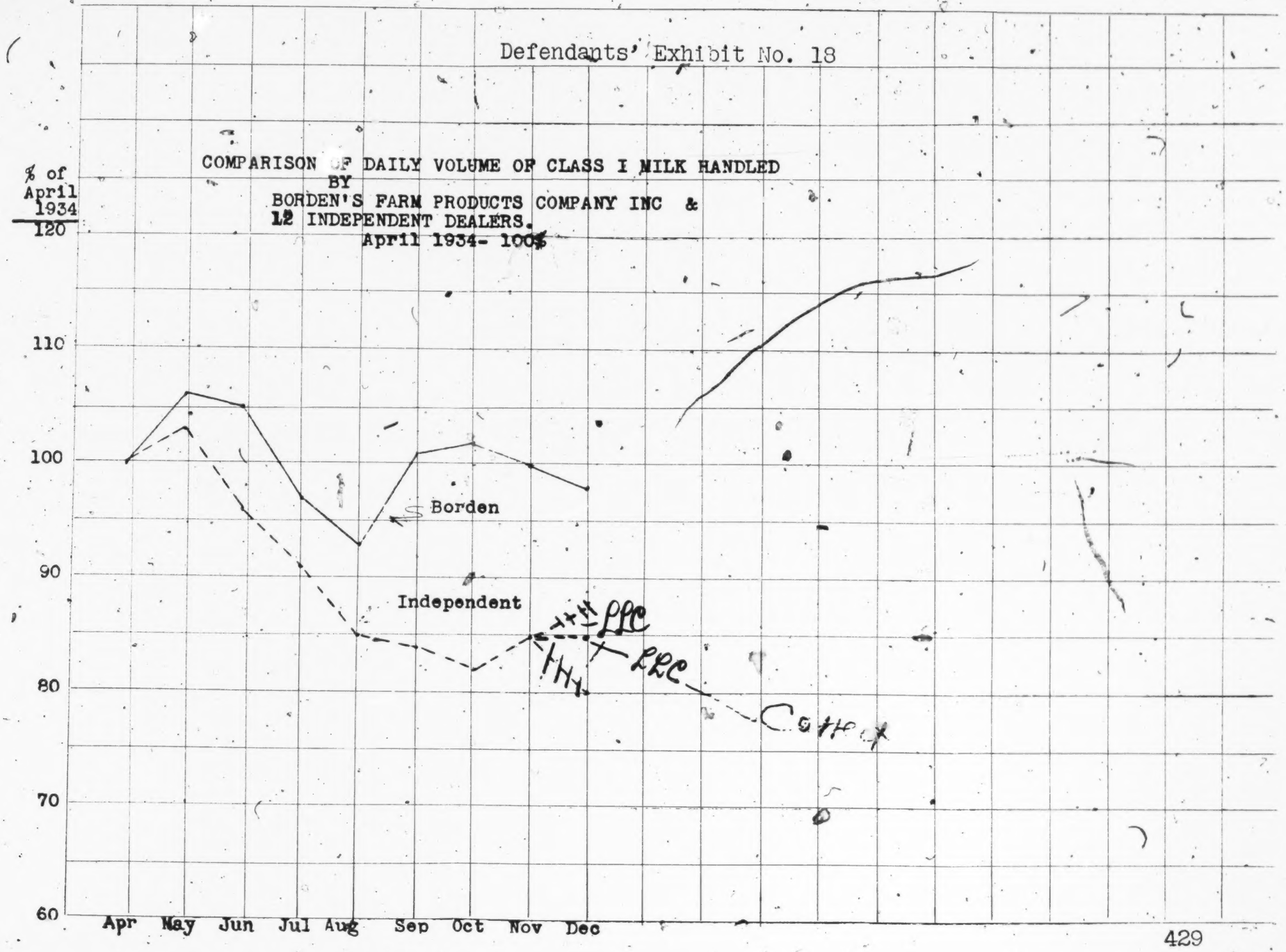


Defendants' Exhibit No. 17

VOLUME OF CLASS I MILK HANDLED
BY
BORDEN'S FARM PRODUCTS COMPANY INC.
May 1933 to Dec. 1934

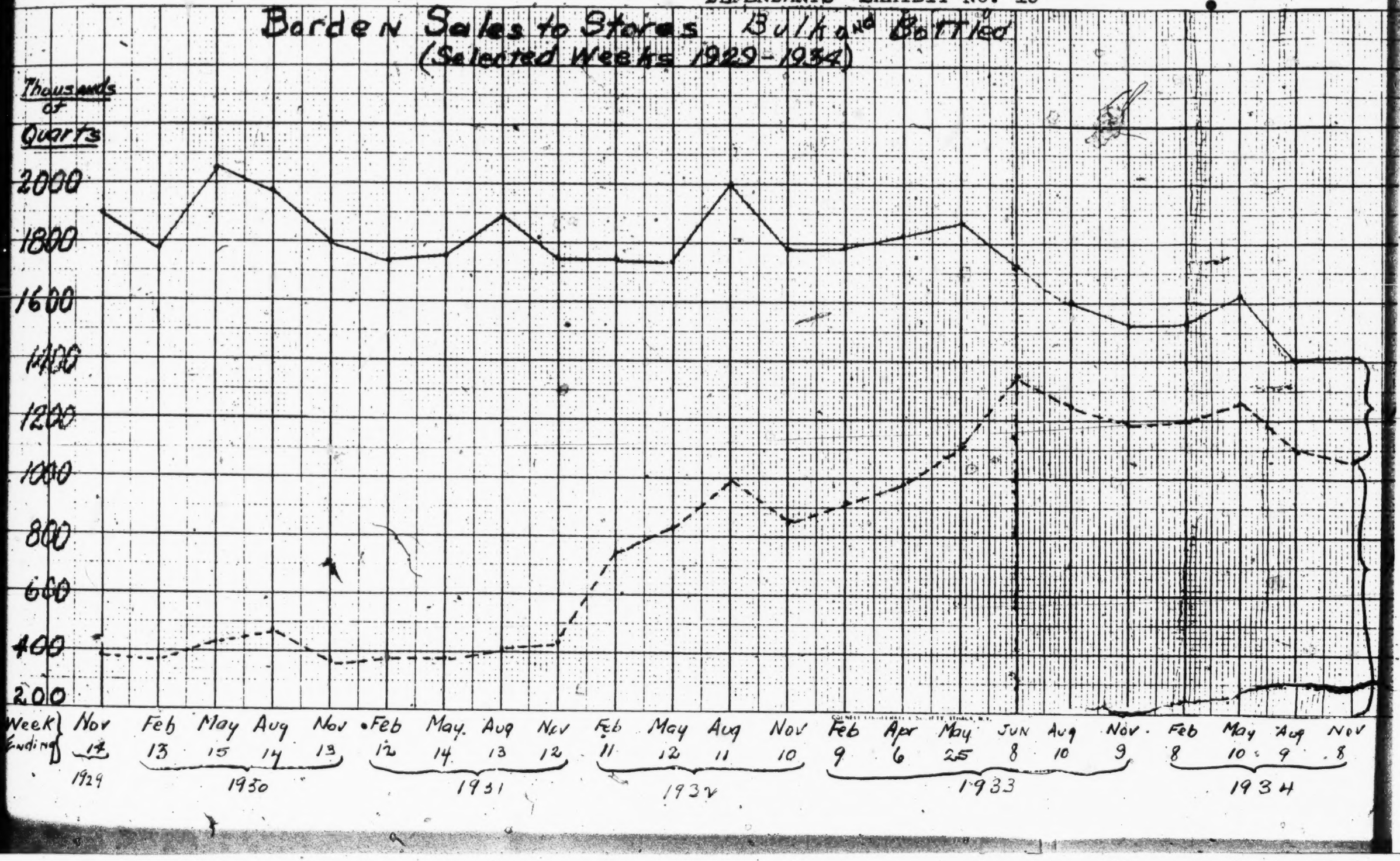


Defendants' Exhibit No. 18

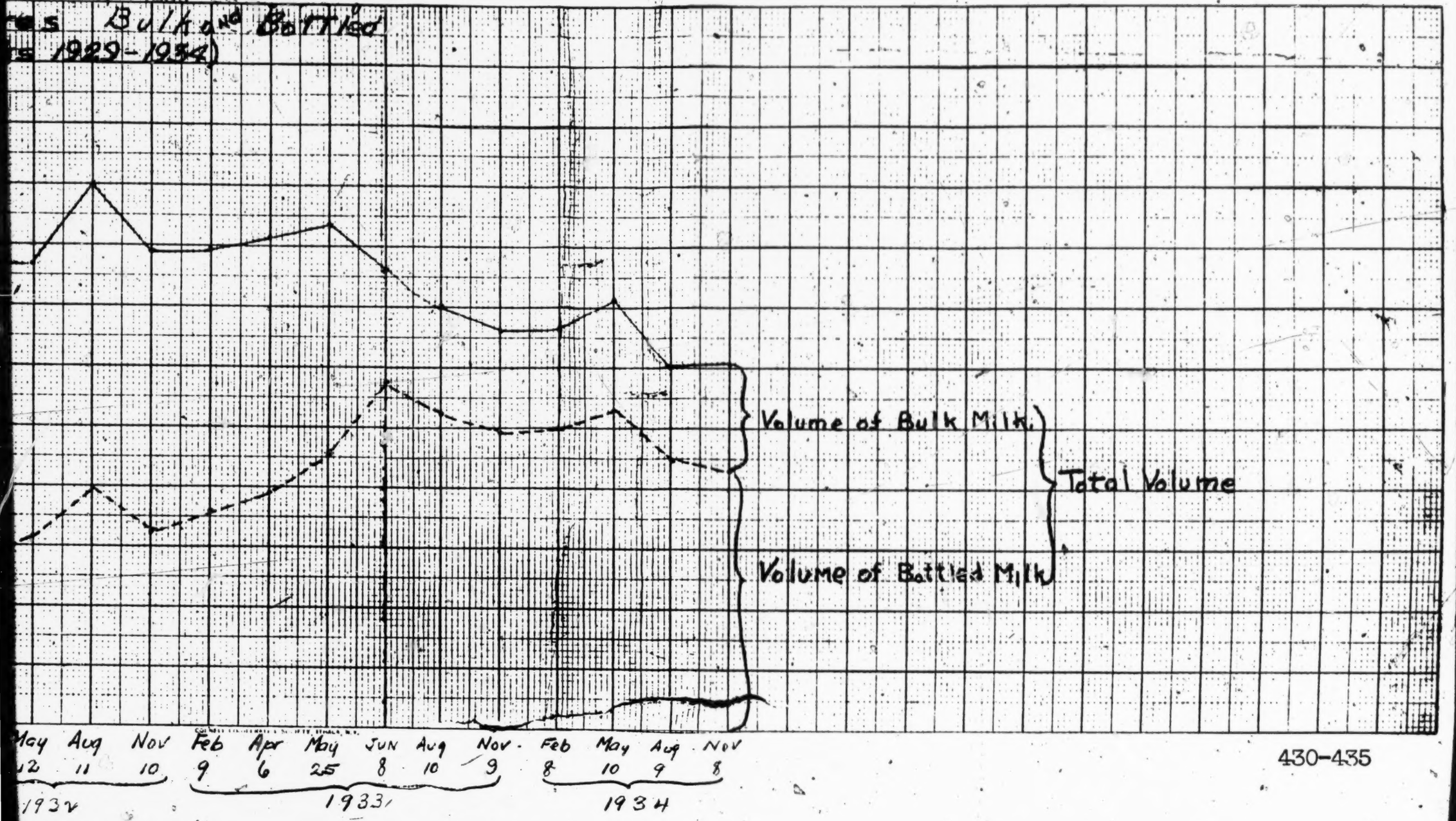


DEFENDANTS' EXHIBIT NO. 19

Borden Sales to Stores Bulk and Bottled
(Selected Weeks 1929-1934)



DEFENDANTS' EXHIBIT NO. 19



430-435

Defendants' Exhibit No. 25 244

You can scrub and clean fruits and vegetables. But milk—your most important food—cannot be washed

You can't wash MILK!

EVERY ONE agrees that milk is the most important human food. But does every one know that milk is the most easily contaminated food? Does every one stop to think that milk cannot be washed? That is why we urge, "Go behind the scenes—see the kind of milk that is bought, how it is rushed to the plant, how it is analyzed, the kind of equipment that it passes through."

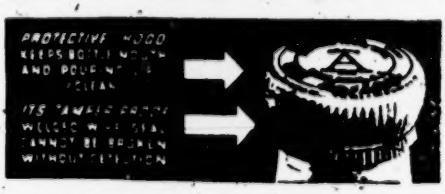
The test of milk is the company, the plant, and the facilities that handle it. Sheffield Farms, in more than 92 years, have perfected milk cleanliness and purity. Sheffield farmers receive more money for extra-pure milk. So Sheffield can (and does) insist on top-quality. And we invite the public to come and see what it takes to keep milk clean and pure. We are proud to keep our plants and our methods open to the public always for inspection.

How we insure Sheffield Farms Milk

Selected milk from inspected herds. Milk rushed to our plants in glass-lined trucks. All milk analyzed by our laboratory. Milk protected every from contact with the air. Each bottle washed 30 minutes in nine purifying operations. Our whole plant taken apart and washed and sterilized each day. Regular medical examination for all employees.

This kind of equipment, this kind of expense is necessary to keep milk absolutely clean. We've invested millions of dollars in the newest, most modern plants to give you extra-pure milk. Order Sheffield Farms Milk and be sure.

THE STANDARD Welded Wire HOOD SEAL GIVES EXTRA PROTECTION TO ALL SHEFFIELD CREAM AND SEALECT GRADE-A MILK



SHEFFIELD FARMS *Sealect* GRADE-A MILK

534 W. 57th St., New York. Telephone COlumbus 5-5400

DEPENDABLE SHEFFIELD HOME-DELIVERY COVERS NEW YORK CITY, NORTHERN NEW JERSEY, WESTCHESTER COUNTY, NEARBY CONNECTICUT TOWNS, AND ALL OF LONG ISLAND

TUNE IN TOMORROW MORNING—AND EVERY MORNING—ON THE SHEFFIELD SCHOOL OF THE AIR, 8:15 O'CLOCK OVER WEAF. FREE TO CHILDREN FOR THE ASKING

436-437

Milk is too important to Buy Blindfolded

NEVER has it been more important than it is today to look for the name on a milk bottle—*and to know that that name stands for unfailing milk quality.*

The name "Borden's" is a guarantee that *extra* care and safety have not been sacrificed to price (although Borden's Milk costs less than in sixteen years). That each quart brings you not only full value for every penny you spend but a *complete feeling of security.*

Extra care with Borden's Milk begins on the farm. Borden's is the only milk company in this district that employs its own full-time staff of veterinarians, and the only company whose dairy inspection work is done only by veterinarians.

That is why more people have Borden's delivered to their door than any other milk. That is why the better stores sell not "just any" milk—but Borden's.

Borden's Milk

438–439

BEWARE of "Bargain Milk"

MUCH of the milk that was formerly sold as "loose milk" in New York City is today sold in bottles.

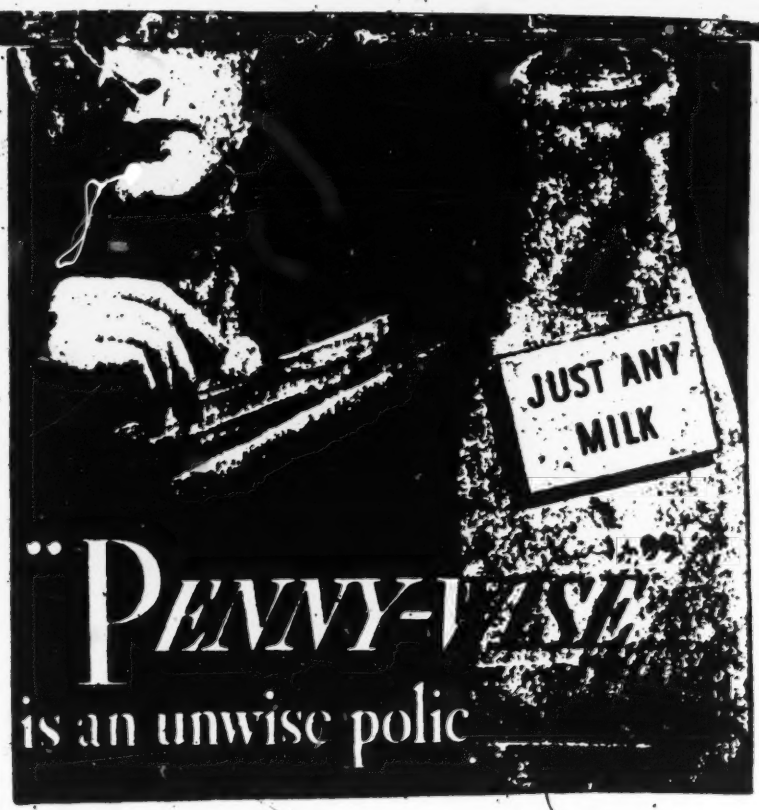
What does this mean?

It means only that the chance of contamination in the store where the milk is sold has been done away with. The milk itself may be no different. *It does not change milk to put it in a bottle.* That is why it is more important today than ever before to be careful when you buy milk. The best way to be careful is to insist on Borden's.

Borden's Milk today is selling for the lowest prices in sixteen years. Whether it is delivered to your home or you buy it at the better stores, it brings safety and security within the reach of everyone.

Borden's Milk · PURE · RICH · COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 350 MADISON AVE., N. Y.



"PENNY-WISE..." is an unwise polic

SAVING pennies is important—but not so important as health.

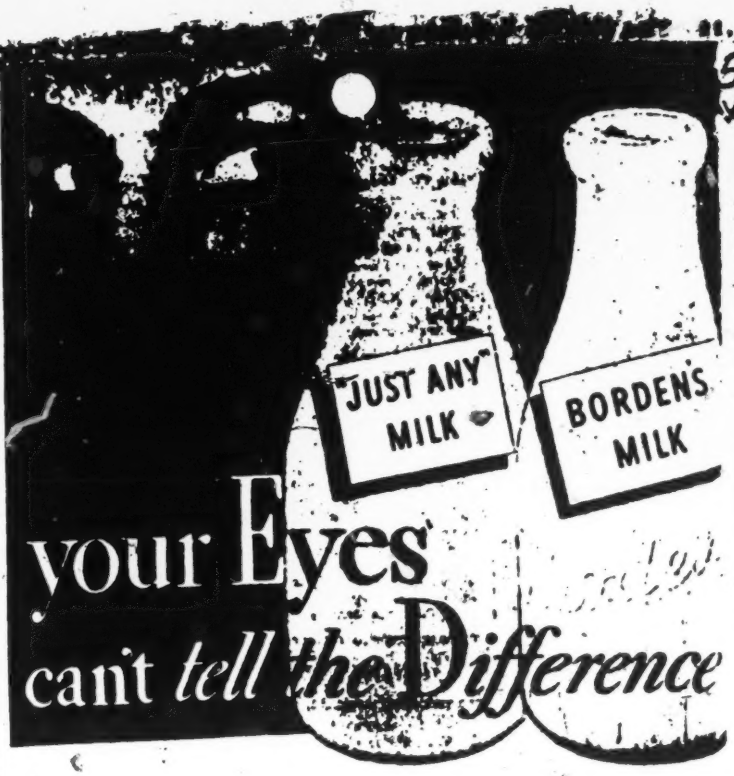
Borden's Milk today costs less than in sixteen years. Why take chances with milk you don't know about?

When you buy Borden's you know your milk comes from well cared for dairies. That the health of every cow is watched by trained experts. Borden's employs its own full-time staff of veterinarians, and is the only company in this district whose dairy inspection work is done only by veterinarians.

A quart of Borden's is a quart of milk you can depend upon. There has been no cheapening of Borden quality in spite of lowered prices. That is why millions of people have Borden's delivered to their doors every morning and why the better stores sell not "just any" milk, but Borden's.

Borden's Milk

PURE • RICH • COUNTRY FRESH



your Eyes can't *tell the Difference*

MOST women in New York would not think of buying "loose milk" for their families to drink. Yet many of them today are buying this very same milk in bottles —frequently at bargain prices.

How much difference is there between "just any" milk in a bottle and a bottle of Borden's?

Plenty. Borden's Milk comes only from carefully selected dairies. Borden's employs its own full-time staff of veterinarians and is the only company in this district whose dairy inspection work is done only by veterinarians.

Borden's not only watches over the health of the cows, but maintains field laboratories throughout the dairy country to inspect the milk as it comes in from the farms. Borden's uses the most modern pasteurizing and bottling methods. Guards the health of your family with every sanitary precaution.

These are a few of the reasons why more families, more doctors, more hospitals depend on Borden's than on "just any" milk. They are the reasons why the better stores today sell Borden's.

Borden's Milk

PURE • RICH • COUNTRY FRESH

W YORK HERALD TRIBUNE, TUESDAY, FEBRUARY 24, 1931

Think this Over

before you choose

MILK is the most perishable food you buy. The most easily contaminated. It is the one food you can least afford to take chances with.

The only bargain in milk worth considering is the best milk you can buy.

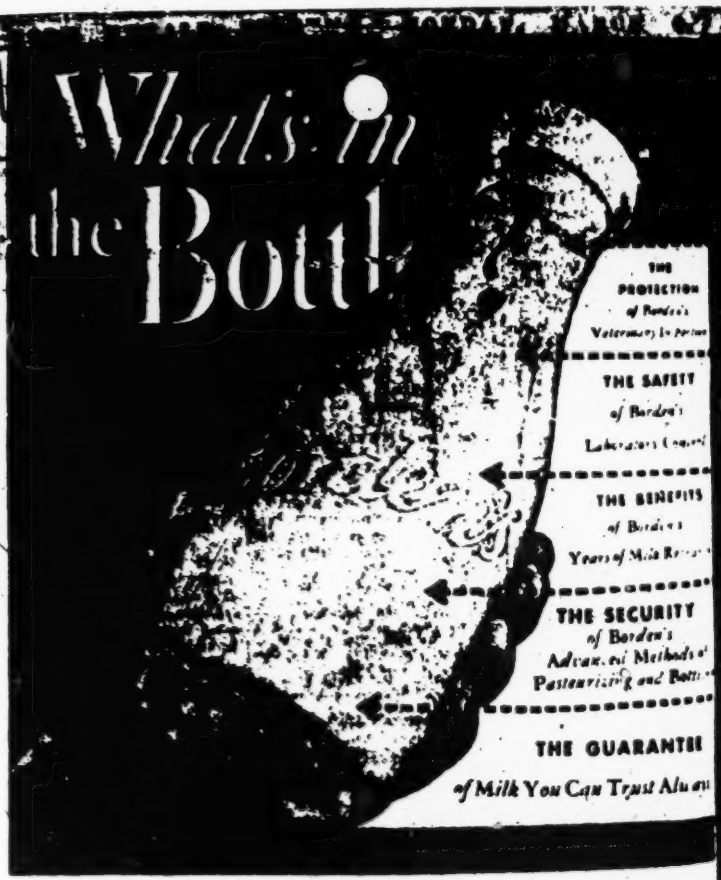
Borden's milk today is sold at the lowest prices in 16 years. Back of every quart of Borden's is a system of milk protection that has served as a model not only for other milk companies, but for state legislation throughout the country.

Here is a safeguard worth more to your family than all the bargains in the world.

Borden's Milk

PURE • RICH • COUNTRY FRESH

FOR YOUR CONVENIENCE



THIS is not a foolish question. There's a great deal more in every bottle of milk than the eye can see.

Into every Borden's bottle goes not just a quart of milk—but a quart of milk safeguarded by a system of milk protection that has served as a model and a guide for city and state legislation.

Yet, Borden's Milk is *not* expensive. To over half a million families the difference in cost between Borden's and "just any" milk means a priceless feeling of security every day of the year. They know that *Borden's quality has not, and will not be sacrificed to price* (although today a quart of Borden's costs less than in 16 years).

You, too, will find it pays to get Borden's whether you have milk delivered to your home or buy it at the better stores.

Borden's Milk PURE · RICH · COUNTRY

Defendants' Exhibit No. 26

Average Prices Case Condensed milk in New York City Wholesale Market Date 3/4 1935 Stenographer JB

	1929 Known brands	1929 Other brands	1929 Dif.	1930 Known brands	1930 Other brands	1930 Dif.	1931 Known brands	1931 Other brands	1931 Dif.	1932 Known brands	1932 Other brands	1932 Dif.	1933 Known brand	1933 Other brands	1933 Dif.	1934 Known brands	1934 Other brands	1934 Dif
Jan	6.33	V.90	.43	6.33	V.93	.40	6.23	V.61	.62	4.85	4.65	.20	4.85	4.45	.35	4.85	None	?
Feb	6.33	V.90	.43	6.33	5.93	.40	6.01	V.52	.49	4.85	4.65	.20	4.85	4.50	.35	4.85	"	?
Mar	6.33	V.94	.39	6.33	V.93	.40	V.80	V.50	.30	4.85	4.65	.20	4.85	4.50	.35	4.85	"	?
Apr	6.33	V.94	.39	6.33	V.93	.40	V.80	V.50	.30	4.85	4.65	.20	4.85	4.50	.35	4.85	"	?
May	6.33	V.94	.39	6.33	V.93	.40	V.80	V.50	.30	4.85	4.65	.20	4.85	4.53	.32	4.85	"	?
June	6.33	V.93	.40	6.23	V.87	.38	V.80	V.50	.30	4.85	None	?	4.85	4.60	.25	4.85	"	?
July	6.33	V.93	.40	6.23	V.85	.38	V.80	V.50	.30	4.85	—	?	4.85	4.60	.25	4.85	4.35	.50
Aug	6.33	V.93	.40	6.23	V.85	.38	V.83	4.80	.18	4.85	4.50	.35	4.85	—	?	4.85	4.35	.50
Sep.	6.33	V.93	.40	6.23	V.85	.38	4.85	4.65	.20	4.85	4.50	.35	4.85	—	?	4.85	4.35	.50
Oct	6.33	V.93	.40	6.23	V.85	.38	4.85	4.65	.20	4.85	4.50	.35	4.85	—	?	4.85	4.35	.50
Nov.	6.33	V.93	.40	6.23	V.85	.38	4.85	4.65	.20	4.85	4.50	.35	4.85	—	?	4.85	4.35	.50
Dec.	6.33	V.93	.40	6.23	V.66	.43	4.85	4.65	.20	4.85	4.50	.35	4.85	—	?	4.85	4.35	.50

Average Prices - Evaporated Case milk in New York City Wholesale Market

Jan	4.44	4.34	.10	3.95	3.64	.31	3.73	3.42	.31	2.98	2.67	.31	2.55	2.40	.15	2.70	2.55	.15
Feb	4.38	4.22	.16	3.95	3.67	.28	3.50	3.21	.29	2.98	2.63	.35	2.51	2.38	.13	2.70	2.53	.17
Mar	4.41	4.20	.31	3.95	3.68	.27	3.50	3.21	.29	2.78	2.53	.25	2.10	2.03	.07	2.70	2.53	.17
Apr	4.30	4.08	.22	3.95	3.68	.27	3.50	3.18	.32	2.75	2.48	.27	2.22	2.13	.09	2.70	2.55	.15
May	4.30	3.96	.34	3.94	3.64	.31	3.32	3.00	.32	2.58	2.37	.21	2.60	2.48	.12	2.70	2.55	.15
June	4.30	3.99	.31	3.88	3.52	.36	3.20	2.85	.35	2.46	2.26	.19	2.60	2.50	.10	2.70	2.55	.15
July	4.30	4.02	.28	3.80	3.49	.31	3.11	2.72	.39	2.26	2.10	.16	2.62	2.54	.08	2.70	2.55	.15
Aug	4.08	3.86	.22	3.80	3.58	.22	3.00	2.63	.37	2.25	2.19	.06	2.70	2.58	.12	2.70	2.55	.15
Sep	3.95	3.82	.13	3.80	3.60	.20	3.00	2.63	.37	2.25	2.25	.00	2.70	2.56	.14	2.70	2.55	.15
Oct	3.95	3.78	.17	3.80	3.59	.21	3.00	2.65	.35	2.25	2.25	.00	2.70	2.55	.15	2.70	2.55	.15
Nov.	3.95	3.77	.18	3.80	3.48	.32	2.98	2.64	.34	2.21	2.23	.02	2.70	2.55	.15	2.70	2.55	.15
Dec.	3.95	3.74	.21	3.80	3.45	.35	2.98	2.68	.30	2.03	2.40	.15	2.70	2.55	.15	2.70	2.55	.15

The above averages, taken from American Creamery & Poultry Produce Review are compiled from the quotations appearing in Producers Price Current, published by Ulmer-Barry Company, 173 Chambers Street, New York City

Ulmer-Barry Co. Publishers.
Chas. F. Ulmer, Vice President.
Gordon Ulmer, Asst. Secy.

Defendants' Exhibit No. 27

NEW YORK

Herald Tribune

451-452

MANY values have changed during the past three years. The health value of milk, however, remains unchanged.

No other food builds health for your children more surely —and economically. No other food gives the same full measure of health protection to your entire family.

Today's prices for milk, like everything else, have come down. In buying milk, however, no woman can afford to be guided by price alone. She must buy, first of all, quality and dependability. That is why we make this positive statement:

The guarantee of unfailing quality is the reputation of the company you buy milk from.

When you buy Borden's you buy milk safeguarded by a huge investment in milk research and modern milk plant equipment. Each quart brings a complete feeling of security. And remember—the price of Borden's Milk is low today than at any time in [illegible] years.

Borden's Milk

only *One* bargain *in* Milk

THESE are "bargain days"—but the wise housewife knows that the only bargain in milk is milk she can depend upon.

You cannot tell milk quality by looking at it—or even by taste. One way you *can* tell it is by the name Borden's on the bottle.

For years the Borden's system of milk protection has been famous throughout the country. It has served in many cities and states as a model for health legislation.

Borden's standards have not been lowered today, although Borden's Milk costs less than at any time in 16 years. They are a guarantee of added safety and added health protection from every quart of milk you buy. That is why millions of people have Borden's delivered to their homes each day—and why the better stores sell not "just any" milk, but Borden's.

Borden's Milk PURE · RICH · COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N. Y. Phone Walker 5-7500 or your local dealer

FOR YOUR CONVENIENCE
HAVE BORDEN'S MILK DELIVERED TO YOUR HOME

There are No Bargains in BABIES

A BARGAIN is something you're willing to take a chance on. *No parents are willing to take a chance with their children's health.* That is why there are no bargains in babies today—and *never* can be!

You cannot afford to take chances with milk either. For milk does more to build health for children—and grown-ups, too—than any other food you buy. But it must be *quality* milk.

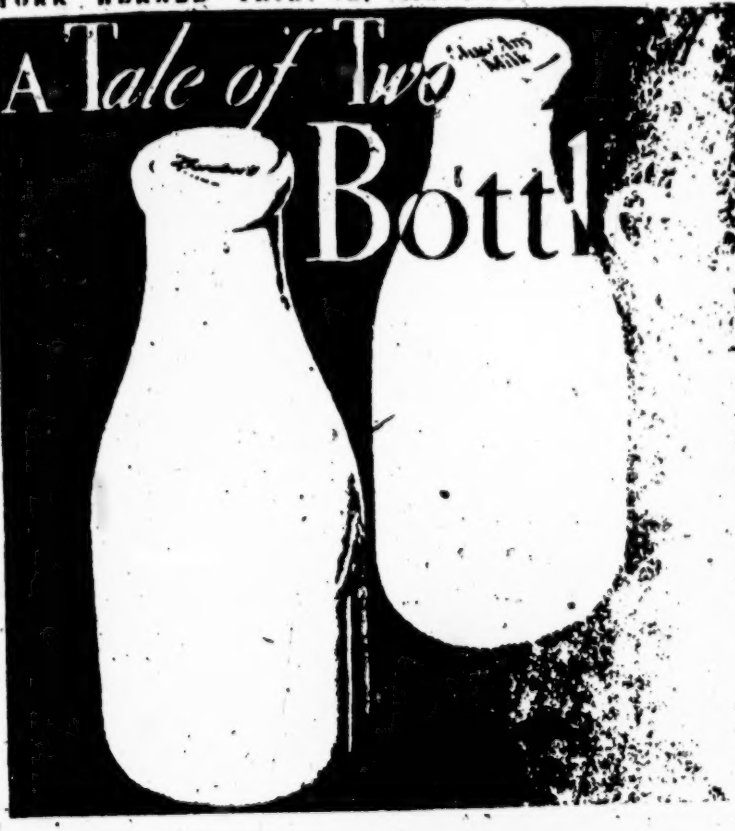
To judge milk quality is not easy. You cannot see it. You cannot feel it. Often you cannot taste it. Yet if it is Borden's Milk you know that quality and purity and safety are there.

A quart of Borden's today costs less than in sixteen years. Borden's high standards, however, are always maintained regardless of price. That is why more people have Borden's delivered to their door than any other milk. That is why the better stores sell not "just any" milk, but Borden's.

Borden's Milk PURE · RICH · COUNTRY FRESH

YORK HERALD TRIBUNE, MONDAY, APRIL 10, 1933

A Tale of Two Bottl



THESE two bottles look very much alike. Each of them contains a quart of milk. Yet one is little known, while the other is bought by more people than any other kind of milk in the world.

One word explains the difference between them. BORDEN'S.

The name Borden's has for over three quarters of a century been a guarantee of milk that can be depended upon in extra measure. Back of every Borden's bottle stand special safeguards. Safeguards that mean added purity and richness from every quart you buy.

Yet Borden's Milk [illegible] *pensive.* It costs less than [illegible] teen years — and it brings [illegible] the priceless security of Borden's unfailing system of milk protection. That is why today millions of people have Borden's Milk delivered to their homes each morning; why you will almost always find the better stores selling [illegible] "just any" milk, but Borden's.

Borden's Milk PURE • RICH COUNTRY, FRESH

[illegible] YOUR HOME

257

No Ups and Downs

THESE are days of uncertain values. Yet the value of children's health remains unchanged. *It must always come first.*

To protect her children's health today when quality is so often sacrificed to price, every mother should be doubly careful about the milk she buys.

The only bargain in milk is the best milk you can obtain. *It is not expensive.* Borden's Milk is selling now at [illegible] at any time in years.

The name Borden's has been a guarantee of purity and quality. It is today—for Borden standards of purity and quality are always maintained regardless of price. That is why for [illegible] peace of mind, and what [illegible] health, it pays to take Borden's—or ask for it by name at any of the better stores.

Borden's Milk

PURE • RICH • COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N.Y. [illegible]

FOR YOUR CONVENIENCE [illegible] DELIVERED TO YOUR HOME

461-462

WANTED—

The assurance of unfailing quality from every quart of milk you buy

THERE are no more exacting judges of milk than the mothers of tiny children.

The fact that more families with children take Borden's Milk than any other kind of milk is conclusive evidence that here is milk that can be trusted.

For over three-quarters of a century the health needs of growing children have determined Borden's standards. They still come first today. That is why although Borden's Milk costs you less than in sixteen years, the quality has not and cannot be lowered.

Because it gives a full measure of health protection every day of the year, millions of people have Borden's delivered to their doors each morning, and the better stores sell not "just any" milk, but Borden's. You, too, will find it pays to trust Borden's.

Borden's Milk

PURE • RICH • COUNTRY FRESH

MYSTERY—Milk that goes bad

MAKE sure of the milk you buy. The fact that you cannot judge milk quality by looking at the bottle makes it doubly important that you find out the story behind the bottle. Where the milk comes from . . . how its purity and richness are protected from the farm to your home. . .

Borden's has never made a mystery of the safeguards it takes with milk. The Borden's system of milk protection is so famous, and so dependable, that it has served as a model for health legislation in many cities and states.

Borden's *also* urges you to visit *any* Borden's pasteurizing plant and to tell you the reasons for every precaution Borden's takes. The confidence feeling of security it brings to see for yourself how your milk is safeguarded is well worth the trip. It explains, too, why millions of people have Borden's delivered to their homes and why the better stores today sell not "just any" milk, but Borden's.

Borden's Milk

PURE • RICH • COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N.Y. Phone WAlker 5-7500 or your local branch

FOR YOUR CONVENIENCE
HAVE BORDEN'S MILK DELIVERED TO YOUR HOME

YORK HERALD TRIBUNE. MONDAY. MAY 15, 1933

but

HER eye is trained to judge the best values in fruits and meats and vegetables. Necessity has taught her to work every penny to the utmost.

...It has taught her, too, that the best milk she can buy is not a luxury. That's why she has Borden's delivered to her door every morning, and insists on Borden's when she buys milk at the store.

Milk is the most important food you buy, and the most perishable. Unlike other foods there is no simple test by which you can judge its quality.

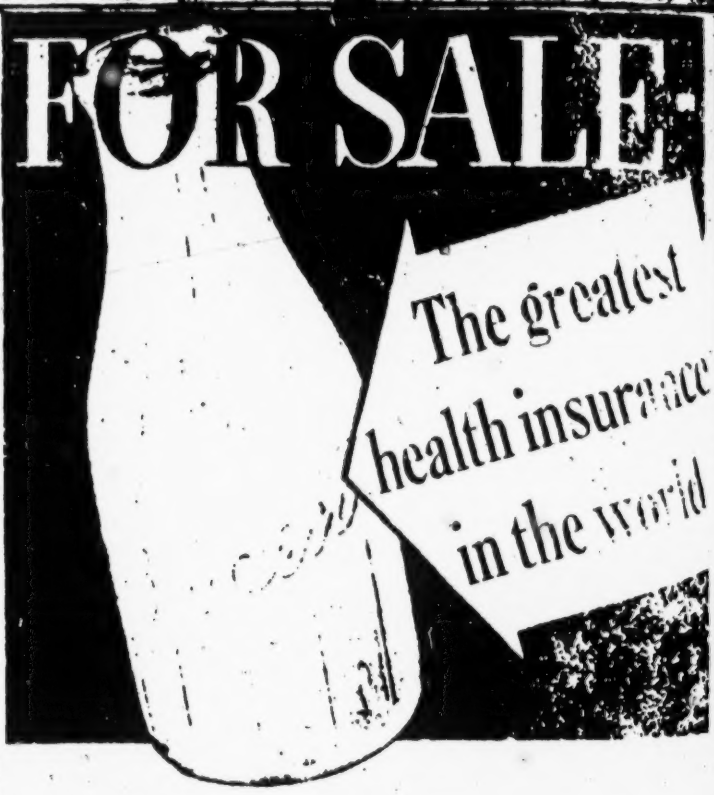
That is why as a safety measure it pays to buy milk protected the Borden way. For Borden's standards guarantee the utmost in milk quality every day of the year. Yet Borden's Milk is not expensive. It is selling today at lower prices than in 16 years. Take advantage of its certain health protection. Have Borden's left at your door too, every morning.

Borden's Milk

PURE • RICH • COUNTRY FRESH

NEW YORK HERALD TRIBUNE, TUESDAY, MAY 28, 1929.

FOR SALE



HEALTH for the future. . . Health for today. . . You buy them both every time you buy a quart of Borden's Milk.

And never has Borden's Milk been a better investment! The quality is higher than ever, for every year Borden's pioneers with new methods and new equipment that make for better milk and better health.

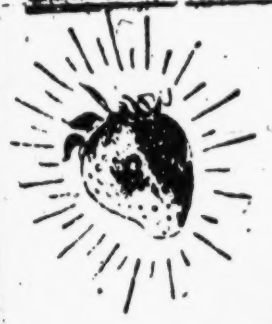
This work is going on today.

It is your guarantee that Borden's quality will not be sacrificed to price. It makes certain that each quart of Borden's gives you fullest returns in health and strength and nourishment for every penny you spend on milk. It is the reason why millions of people have Borden's Milk delivered to their homes and ask for it by name when they buy milk at the better stores.

Borden's Milk

PURE • RICH • COUNTRY FRESH

YOUR CONVENIENCE
YOUR HOME



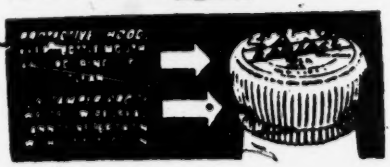
Yes, Ma'am, you can wash berries

but

YOU CAN'T WASH MILK!

YOU can wash berries and other fruits, but "you can't wash milk." Likewise, we can wash bottles, and *do*—spending 30 minutes on each bottle in 9 purifying operations, sterilizing them as no housewife could. Even we "can't wash milk," however. But we can *watch* it, and *do*—every step of the way from farm to family. Buy quality milk by *name*—this same, high-grade Sheffield Milk we have been supplying for 93 years. Visit our plants and satisfy yourself that Sheffield Milk is the finest to be had. Be sure you get it. See the name "SHEFFIELD" on the bottle. It is your assurance of the very finest milk.

THE STANDARD Welded Wire HOOD SEAL GIVES EXTRA PROTECTION TO ALL SHEFFIELD CREAM AND SEALECT GRADE-A MILK



SHEFFIELD FARMS

Sealect GRADE-A MILK

524 W. 57th St., New York • *Telephone*, COlumbus 5-8400

Dependable Sheffield home-delivery covers New York City, Northern New Jersey, Westchester County, nearby Connecticut towns, and all of Long Island

LISTEN EVERY SATURDAY MORNING ON THE SHEFFIELD SCRAPBOOK PROGRAM, CBS Stations

18

She's always interested in trying new dishes...

But she doesn't Experiment with Milk

EACH quart of milk is an investment in health. That is the reason hundreds of thousands of women who experiment with other foods refuse to take chances with "just any" milk. Year after year they stay on the Borden standard. They know that Borden quality is maintained regardless of price.

No other company takes greater care to safeguard milk than Borden's. No other company has been so widely copied. In fact, Borden's system of milk [illegible] tion has proved so [illegible] that many cities and [illegible] patterned health legislation.

You, too, will find the [illegible] Borden's an unfailing [illegible] *safe* milk. Have Borden's delivered to your home regularly. For your own protection insist on Borden's when you buy milk at a store. You can count on Borden's [illegible] returns in health and strength and energy for every penny you spend.

for

Borden's Milk

PURE • RICH • COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N.Y. Phone Walker [illegible]

FOR YOUR CONVENIENCE [illegible] MILK DELIVERED TO YOUR HOME

PRIVATE DATA

4 DAYS

$60.00

THE EVIDENCE

It *Pays* to Buy BORDEN'S

Families with children don't have to take our word for it that Borden's Milk gives a full measure of health protection. They know from the story the scales tell how dependable it is.

... And the fact that many of these families first took milk from Borden's on the advice of their doctors gives an added feeling of security.

For three generations Borden's has been first choice where there are children in the family.

The reason why is simple. Borden's has never ceased to pioneer for better milk and better health.

When cities and states first enacted milk regulations many used Borden's standards as their guide. They were the highest seventy-five years ago. No standards are higher today.

Borden's Milk PURE • RICH COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N.Y. Phone WAlker 5-7300 or your local branch

FOR YOUR CONVENIENCE

ERED TO YOUR HOME

475-476

"IT may be good milk—but if I don't know all about it I don't buy it. I *do* know about Borden's—so why not be sure of getting what I want."

For three generations the name "Borden's" has guaranteed highest quality milk. In fact, Borden's has been closely identified with each step forward in milk production. In the early days of milk control Borden's standards were used as a model for the milk regulations of many cities and states. Today they are an assurance of the most up-to-date milk production available—a guarantee to millions of city people of the best milk their money can buy.

You, too, will find it pays to have Borden's delivered to your home every morning. To ask for Borden's by name when you buy milk at a store.

Borden's Milk

PURE • RICH • COUNTRY FRESH

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON ST., N.Y. Phone Walker 5-7500 or your local branch

FOR YOUR CONVENIENCE
HAVE BORDEN'S MILK DELIVERED TO YOUR HOME

NEW YORK
Herald Tribune
SUNDAY, FEBRUARY 4, 1934

Mrs. A. Charles Schwartz

Mrs. Schwartz with her son and daughter, Alexander Charles and Craigie. The children are being brought up on Sheffield Sealect Grade A milk, and endorse it with enthusiasm. Mrs. Schwartz is a trustee of the New York Infirmary for Women and Children.

Miss Felecite Pratt

Left—The quiet, easy action of the Remington Noiseless Portable makes homework a pleasant pastime even for the smaller members of the family. Miss Pratt, seven-year-old daughter of Mr. and Mrs. John T. Pratt jr., is preparing her lessons for school. She receives consistently high grades.

Jean LaGuardia

Mrs. LaGuardia and the Mayor are proud of their five-year-old daughter, Jean. They are never too busy to make certain she gets plenty of Borden's milk.

Underwood and Underwood

Find out what BORDEN'S SERVICE means

PROMPT DELIVERY

● Borden's prompt delivery service is something you will appreciate not only on moving day, but every day of the year. Every Borden milkman has a personal feeling of responsibility about his job. He gets the milk around regardless of weather and regardless of difficulties.

COUNTRY FRESH MILK

● The Borden system of milk protection assures you milk with its country-fresh flavor unchanged. Huge glass-lined, insulated tank cars and trucks keep the milk at a low, even temperature on its way to the city. No hand can touch it. No change take place in its purity.

MILK SAFETY

● Borden's operates its own field laboratories in the heart of the dairy country to check the purity and richness of the milk as it comes from the farms. All Grade A cows are tuberculin-tested. Borden's own full-time staff of veterinarians watches over the health of the cows and the cleanliness of the farms.

FLAVOR

● There are four important reasons for the rich, country-fresh flavor of Borden's Milk: 1. Borden's pays extra premiums for extra richness. 2. Borden's veterinarians help regulate the feeding of the cows. 3. Breeds of cows that produce milk rich in cream are constantly being added to Borden's Grade A herds. 4. Borden's Milk is rushed with the greatest possible speed from the farm to your doorstep.

BORDEN'S ALSO DELIVERS

● The Borden milkman also delivers butter, cream, eggs, buttermilk, cottage cheese and Walker-Gordon products. That's a convenience at any time of year—and a real lifesaver on Moving Day! Order whatever dairy products you need left at your door with the milk.

Borden's service covers New York City, Westchester, Long Island, New Jersey and Connecticut within 50 miles of New York.

Borden's **GRADE·A·MILK**

Pure · Rich · Country Fresh

BORDEN'S FARM PRODUCTS COMPANY, INC., 350 MADISON AVE., NEW YORK, PLANTS AT [illegible]

NEW YORK HERALD TRIBUNE, SATURDAY, MAY 5, 1934

MILK PRICES

A STATEMENT TO THE PUBLIC

IN order that there may be no misunderstanding as to the purpose of Borden's Farm Products Co., Inc. in taking action against the law requiring advertised brands of milk through stores to be sold at a higher price than unadvertised brands, we wish to make our position clear.

By reason of the New York Milk Control law, a difference of one cent a quart exists today between so called "well advertised" milk and "not well advertised" milk sold by stores in New York City.

In other words, the public must by law pay stores 11 cents a quart for Borden's Milk but may pay only 10 cents for a so called "not well advertised" brand of milk.

We believe that this provision of the law is unconstitutional and discriminatory, and is unfair both to the public and to ourselves. We have, therefore, instituted a suit to have this provision of the law set aside.

In taking this action, we seek simply to make it possible for the public to buy milk of the highest quality—Borden's milk—at as low a price as any other milk.

For more than 75 years we have worked to improve milk quality and to acquaint the public with those improvements. We have tried at the same time, through advertising, to increase general appreciation of the value of all milk—thereby making some contribution, we believe, both to public health and to total milk consumption.

We do not think that we should be penalized for this course by being forced to sell Borden's milk at a higher price, or that the public should be penalized by having to pay more for a quality product because of its advertising, which is measurable and of a constructive character.

In seeking the right to sell Borden's milk through stores at the same price as other milk, we wish to make it clear that we are not in favor of any course which would result in higher retail prices for any milk. This company has stated clearly recently, and wishes to repeat emphatically here, that it believes any increase in milk prices at this time is undesirable, because of the probable adverse effect on purchasing power and consumption, and therefore, on public health and the welfare of all concerned, including the dairy farmer.

H. A. Crönk, *President*

BORDEN'S FARM PRODUCTS COMPANY, INC.

483-484

A BEAUTY TREATMENT

EVERY DOCTOR APPROVES

THE nerves, indigestion and lowered vitality that rob the skin of its youthful freshness are in a large measure caused by the foods you eat.

Build up your body and your complexion will reflect the difference! Get more sleep, more fresh air . . . and watch your diet. *Drink 2 or 3 glasses of milk each day.* This is particularly important—for milk is the *one* food that best counteracts the rush of modern life.

In fact, one of the outstanding nutritional discoveries of the past decade is that this perfect growth food of childhood can do more to keep adults *feeling* and *looking* young than any other food.

Take advantage of this simple health and beauty treatment yourself. Drink your quota of Borden's Milk each day. Borden's extra safeguards not only protect your health, but assure you milk that is country-fresh.

Borden's **GRADE • A • MILK**

Pure · Rich · Country Fresh

BORDEN'S FARM PRODUCTS CO., INC., 110 HUDSON STREET, NEW YORK. Phone WAlker 5-7500 or your local branch

Extra Health Protection . . .

POUR out a brimming glass of Borden's Golden Crest. You'll notice at once how much better it tastes—how creamy-rich this new milk is!

Several thousand extra "cream-producing" cows have been added to the special dairy herds that supply Golden Crest Milk. The farmers are paid an extra premium for it. Borden's veterinarians supervise all Golden Crest farms and examine the entire herd at frequent intervals. And for added safety, every Golden Crest cow has also been tuberculin-tested.

The result is a milk that is not only far *better tasting*—but a milk that can *do* more for every member of your family. For the *extra cream* that makes Borden's Golden Crest a more popular drink, also makes it a more healthful one! . . . Yet Golden Crest costs you no more than regular Grade A. Ask your neighbors what they think of Golden Crest. Many of them have been giving their families this creamier milk ever since it was introduced last June.

Sold only in the special bottle with the red and gold crest and protected by the Standard Health Approved Capsule.

Borden's

GOLDEN CREST

DRINK MORE MILK . . IT'S GOOD FOR YOU!

BORDEN'S FARM PRODUCTS COMPANY, INC., 110 HUDSON STREET, NEW YORK. ROOSEVELT 9-7500 OR YOUR LOCAL BRANCH

487-488

"Do try it Woo Sing.
That's not just regular milk—it's
Borden's Golden Crest—the richer,
better-tasting Grade A . . ."

489-490

EW YORK HERALD TRIBUN MONDAY, NOVEMBER 26, 193

Burglars? Ridiculous!

You heard me getting this glass of Borden's Golden Crest. Better have one, too—that extra cream sure does make a difference.

Defendants' Exhibit No. 29

BORDEN'S FARM PRODUCTS CO. INC.
SALES OF FLUID MILK

March 5, 1935.

Data for March, 1933 derived from Defendant's Exhibit 1, page 3; data for August, 1933 from Spencer investigation schedules 25-26-27; data for November, 1934 from Eastlack compilation of March 2, 1935.

Item	MARCH 1933			AUGUST 1933			NOVEMBER 1934		
	Total qts.	Daily Av.	%	Total qts.	Daily Av.	%	Total qts.	Daily Av.	%
A Retail	7,249,376½	233,850.8	23.43	5,496,402½	177,303.3	19.67	6,712,740½	223,758.0	23.66
B Whlsle	879,482	28,370.4	2.84	811,442	26,175.5	2.90	683,112½	22,770.4	2.41
B Retail	11,496,623	370,858.8	37.16	10,435,776½	336,637.9	37.35	11,709,170	390,305.7	41.26
B Whlsle	10,917,213½	352,168.1	35.28	10,876,037¾	350,839.9	38.93	9,271,266¼	309,042.2	32.67
Misc. & Special	400,383	12,915.6	1.29	320,313¼	10,332.7	1.15	----	----	
Total above	30,943,078	998,163.7	100.00	27,939.972	901,289.3	100.00	28,376,289½	945,876.3	100.00
To dealers				825,534½			292,534		
				28,765,506½			28,668,823¼		

Defendants' Exhibit No. 30

BORDEN'S FARM PRODUCTS CO. INC.
SALES OF FLUID MILK
March 1933 = 100%

Item	March 1933	August 1933	November 1934
A. Retail	100.0%	75.82%	95.68%
A. Wholesale	100.0	92.26	80.26
B. Retail	100.0	90.77	105.24
B. Wholesale	100.0	99.62	87.75
Misc.&Special	100.0	80.00	-----
Av.	100.0	90.29	94.76

(Dealer to Dealer Sales omitted)

Defendants' Exhibit No. 31

BORDEN'S FARM PRODUCTS CO. INC.
SALES OF FLUID MILK

AUGUST 1933 = 100%

ITEM	August 1933	November 1934
A. Retail	100.00%	126.20%
A. Wholesale	100.00	86.99
B. Retail	100.00	115.94
B. Wholesale	100.00	88.09
Misc.&Special	100.00	-----
Av.	100.00	104.95

(Dealer to Dealer Sales omitted)

Defendants' Exhibit No. 34

OUR CITY—NEW YORK

A BOOK ON CITY GOVERNMENT

BY

THE HIGH SCHOOL STUDENTS OF NEW YORK CITY

SUPERVISED BY

FRANK A. REXFORD

DIRECTOR OF CIVICS, NEW YORK CITY

PROPERTY OF
BOARD OF EDUCATION
SEP 7 19
CITY OF NEW YORK

ALLYN AND BACON

BOSTON NEW YORK CHICAGO
ATLANTA SAN FRANCISCO DALLAS

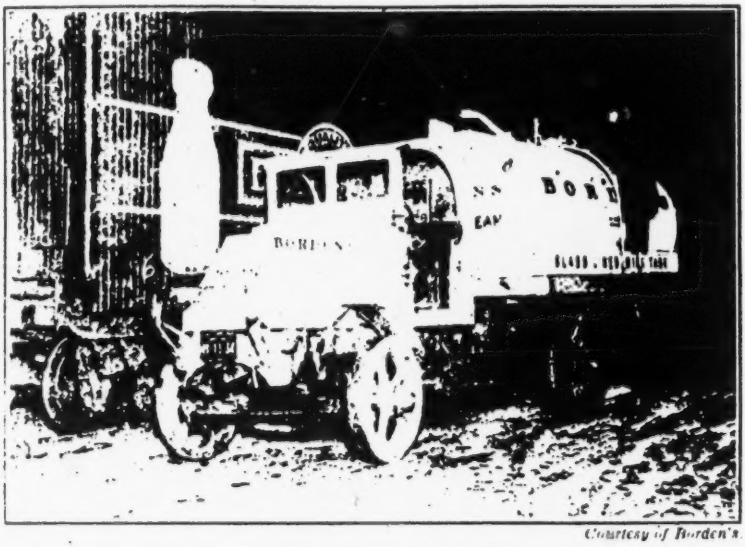
500

Courtesy of New York City Department of Health.

THE DISPOSAL OF ADULTERATED MILK.

packed in the familiar milk wagons and distributed to private houses, stores, and restaurants.

Now we have the tank car as a means of transporting milk from the country to the city. These tanks are glass-lined and have a capacity of 3000 gallons. Since they are built on the principle of the thermos bottle, no ice is needed, and the milk keeps at the same temperature throughout the trip to the city.



Courtesy of Borden's

THE GLASS-LINED TANK CAR.

The advantage of the tank car is that the milk may be piped directly from it to the pasteurizing plant without having to be reloaded on trucks. Since there is less handling of the milk, there is less danger of contamination.

Bread and Bakeries

Next to milk, the most important food for most of us is bread. Our bakeries now are clean and sanitary. A law was passed in 1913 requiring licenses for bakers and bakeries, monthly examinations of the bakeries, enforcement of certain standards of cleanliness, and observance of much higher standards of light and ventilation.

The inspectors are also directed to see that the bread, when displayed, is protected from dust and flies. Baked goods or their ingredients are not tested for purity and quality, unless consumers complain to the Department of Health that the purity of some particular product is doubtful.

Fruits and Vegetables

Courtesy of New York City Department of Health

DESTRUCTION OF A CONSIGNMENT OF FRUIT.

Another essential of a well-balanced diet is found in fruits and vegetables. Both are inspected by health officers at docks or markets. Any consignment that has deteriorated must be so labeled and cannot be sold in New York City. It must be destroyed by the owner and may be destroyed by the inspector. Health officers from the Bureau of Food and Drugs have full police power in such matters. Their decision is final. Should the vegetable dealer refuse to obey, he may have his license to sell vegetables revoked. After inspections, the fruits and vegetables are sold to the wholesaler; by him to the retailer; and finally by the latter, to the consumer. The inspectors visit the wholesale and retail dealers. They see that the stores are kept clean; that all food products are kept covered to protect them against flies; and that the vegetables that are being sold are in good condition.

Meat

Meat has an important place on our diet list. The many slaughtering and meat-packing establishments in New York City and its environs make this region one of the most important slaughtering centers in the country. One important reason for the development of this industry in New York City is the

[fol. 504] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law

INTRODUCTORY STATEMENT

The plaintiff, Borden's Farm Products Company, Inc., is a New York corporation engaged in selling fluid milk in New York City and other communities. This suit is for an injunction against the Commissioner of Agriculture of the State of New York (Charles H. Baldwin until February 19, 1935, and, thereafter, Peter G. Ten Eyck), Kenneth F. Fee, as Director of the Division of Milk Control, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of New York County. Jurisdiction to entertain the suit is conceded.

The statutory provision directly involved is the "unadvertised differential" of the New York Milk Control Law. The 1933 Law (ch. 158 of N. Y. Laws of 1933) was enacted April 10, effective immediately. It created a Milk Control Board, to continue until March 31, 1934, with power to fix [fol. 505] by official order the minimum wholesale and retail prices to be charged for milk handled within New York State for fluid consumption, including prices to be charged by milk dealers to stores and the prices to be charged by stores to consumers except for consumption on the premises. The 1934 Law (ch. 126 of N. Y. Laws of 1934) re-enacted substantially the same provisions effective until March 31, 1935, but under that law the defendant Commissioner and the defendant Director, instead of the Board, became the principal administrative officers charged with enforcement. The 1935 Law (ch. 10 of N. Y. Laws of 1935) continues substantially the same provisions in effect until March 31, 1936. The provision which the plaintiff challenges in this suit is the last sentence of Section 258-q of the 1934 Law, which is substantially a re-enactment of Section 317-c of the 1933 Law and which reads:

"It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged

continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Findings of Fact

1. The plaintiff has for many years conducted its business under the trade name "Borden's" and has created and developed in New York City a valuable good will in connection with the sale of bottled milk under said trade name.

2. A serious decline in the price of milk beginning in the [fol. 506] year 1931 resulted in producers receiving for their milk a price less than the cost of production. In order to meet the emergency created by this situation a joint legislative committee known as the Pitcher Committee was appointed by the New York Legislature by resolution adopted March 10, 1932, which recited as its purpose:

"to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer."

Early in 1933, the Committee made a report, subsequently printed as New York Legislative Document No. 114 of 1933, commonly called the Pitcher Report.

3. The New York Metropolitan Market contains all of New York City, and certain adjoining parts of New York, Connecticut and Northern New Jersey as shown by a map opposite page 32 of the Pitcher Report. The population of the Metropolitan Market, according to the census of 1930,

was over 10,000,000, of whom about 69% were in New York City. (Pitcher Report, page 33.)

4. The Metropolitan Market obtains its supply of milk and cream from an area extending roughly 500 miles to the west and north known as the New York Milk Shed. It includes nearly the whole of New York State and parts of Connecticut, Maryland, Massachusetts, New Jersey, Pennsylvania and Vermont, as shown by a map on page 35 of the Pitcher Report. In early 1933, there were approximately 83,000 farmers in New York State producing milk for sale, of whom about 31,000 were members of the Dairy-[fol. 507] men's League Cooperative Association and about 15,000 were members of Sheffield Producers Cooperative Association. Approximately 50% of the milk produced in New York State was sold in the Metropolitan Market. Approximately one-third of the milk produced by members of the League was sold by the League to the plaintiff. The remaining two-thirds was sold by the League either directly to consumers or to independent dealers in New York City and elsewhere. Approximately 90% of the milk purchased by the plaintiff was purchased from the League. Sheffield Producers supplied most of the milk sold in New York City by Sheffield Farms Company. The farmers not members of either of those large co-operative associations are commonly called "independent" farmers and the dealers through whom their milk is marketed are commonly called "independent" dealers.

5. The principal causes of the extremely low prices paid to producers for milk were: the unprecedented decline in the general level of prices; a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk leading to demoralization of prices in the Metropolitan area and other markets and the failure of charges for transportation and distribution to be reduced in proportion to the reduction in retail prices of milk and cream. (Pitcher Report, pages 14-5.)

6. For many years before the enactment of the 1933 Milk Control Law, the League and Sheffield Producers had employed in the sale of their milk what was known as the classified price plan. This plan provided for the sale of milk in four general classes, depending upon utilization.

[fol. 508] Class 1 included milk used for fluid consumption. Class 2 included cream. Class 3 included milk manufactured into condensed or evaporated milk. Class 4 included milk manufactured into cheese or butter. The prices charged the dealer varied in accordance with utilization, Class 1 commanding the highest price and Class 4 the lowest.

7. Under the classified price plan producers were paid a blended price per one hundred pounds approximately equivalent to the quotient of the total cash receipts derived from the sale of milk for utilization in all four classes, divided by the total pound receipts of milk.

8. Under the classified price plan producers who were members of the League and of Sheffield Producers were at all times assured of an outlet for all milk produced by them, and, through their associations, they shared equally the burden of surplus milk produced by their members.

9. Under the best practicable adjustment of supply to demand, the industry must carry a surplus of about 20% in excess of fluid consumption because milk, an essential food, must be available as demanded by consumers every day in the year. Demand and supply vary from day to day and according to season. Milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. In 1931, 1932 and early 1933, there was in the New York Milk Shed a surplus materially and increasingly in excess of the normal requirement of 20%.

[fol. 509] 10. Prices obtainable for surplus milk were much less than those obtainable for milk sold for fluid consumption because surplus milk products necessarily were disposed of in competition with those produced in other regions where costs were lower.

11. For many years before the enactment of the 1933 Law, most independent dealers purchasing from independent producers paid a price for all milk purchased substantially the same as the blended price paid to the members of the Sheffield Producers, which was in general somewhat higher than the blended price paid to the members of the Dairymen's League. A very large proportion of the milk purchased by independent dealers from independent producers was sold as fluid milk (Class 1).

12. Most of the surplus in the New York Milk Shed was carried by the League and its dealer customers (including the plaintiff) and by Sheffield Farms Company. Those dealers who sold all or nearly all their supply as fluid milk were able to engage very generally in price cutting which repeatedly forced the large dealers (including the plaintiff) to lower their prices so as to protect their business.

13. Unequal distribution of the surplus was a serious disturbing factor. The smaller dealers generally contracted for their minimum requirements and depended upon emergency purchases when threatened with a shortage. The larger dealers contracted with the producers' associations for substantially their entire requirements and did not depend upon emergency purchases.

[fol. 510] 14. In the Metropolitan Market "retail" means only house to house delivery in bottles by vehicles to the consumer; "wholesale" means delivery to grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile establishments, and includes sales by stores to consumers. Wholesale business is done partly in bottles and partly in cans. Milk in cans is called "bulk" or "loose" milk.

15. At the time of the enactment of the 1933 Law, there were about 25,000 stores in New York City to which bottled milk was sold for resale not to be consumed on the premises. The number is approximately the same now.

16. In 1930 of the total receipts of milk in the Metropolitan Market sales were approximately as follows:

In bottles to stores	7.5%
In bulk to stores	23.6%
In bulk to restaurants, etc	22.0%
In bottles retail house to house	49.9%

(Pitcher Report, page 163).

In November, 1931, the majority of the independent dealers were selling some bottled milk to stores.

17. Since 1930, there has been a trend from retail sales of bottled milk to sales of bottled milk through stores.

18. For a number of years there have been two grades of milk sold in New York City, Grades "A" and "B", the

former being held to higher sanitary standards and higher fat content and ordinarily commanding a higher price. [fol. 511] Not more than 20% of the milk sold in the Metropolitan Market is Grade "A" and most of that is sold at retail.

19. For many years there has been active competition in the business of selling milk in New York City.

20. In 1931 there were more than 189 dealers in New York City engaged in the business of selling fluid milk. In October, 1933, there were 200 dealers, of whom 177 were relatively small, none having more than 10 routes. Nineteen were intermediate in size, and only four had each more than 100 routes. These four, the plaintiff, the Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company were the largest dealers in New York City and together had 89.2% of all the retail or house to house routes and 32.6% of all the wholesale routes, and they sold a daily average of 1,638,248 quarts of milk out of a total daily average of 2,437,795, or 67.6%.

21. The plaintiff and Sheffield have "acquired (their) present dominant position in the New York Market, partly by a gradual expansion of (their) own sales organizations and in part by the purchase and consolidation of other companies." (Pitcher Report, p. 173.)

In 1933 "competition in the business of milk distribution in most cities of the State is keen to the point of being wasteful and destructive. On the other hand, there has been over a period of years a marked tendency toward fewer and larger distributors. This tendency, though temporarily interrupted by unusual conditions, may be expected to continue when conditions are again stabilized.

"In the past ten years large corporations have developed, embracing numerous subsidiary companies engaged in the handling and distribution of dairy products. The two [fol. 512] largest of these corporations, having vast resources and widely scattered operations, play an important part in the handling of milk produced in this State." (Pitcher Report p. 20.)

The two largest corporations referred to are The Borden Company, which indirectly owns and controls the plaintiff,

and National Dairy Products Corporation, which has a similar relation to Sheffield.

The plaintiff was organized in 1917 to take over the route department of The Borden Company. Since its organization, numbers of firms or businesses have been consolidated with it. The plaintiff also operates through several subsidiary companies. The plaintiff, The Borden Company and their subsidiaries operate a chain of dairy stores (9 of them in New York City) and manufacture milk products (including cheese, condensed and evaporated milk, milk sugar, powdered and malted milk, casein and related products) in addition to engaging in the "retail" and "wholesale" business above referred to.

At no time in recent years has any one company had a monopoly or even a near monopoly of the business of the distribution of milk in New York City. (Pitcher Report, p. 165.)

22. The average amount of bottled milk sold by all dealers to stores in New York in November, 1934, was between 900,000 and 1,000,000 quarts per day. Of such amount, as bottled quarts of Grade "B," under their respective trade names, the plaintiff sold slightly more than 15.0%, Sheffield Farms Company slightly more than 17.0%, Dairymen's League approximately .5% and M. H. Renken Dairy Company approximately 2.5%.

23. Since the enactment of the 1933 Law, the advertised dealers have had a smaller proportion relative to the inde- [fol. 513] pendent dealers of the total sales of bottled milk to stores in New York City than before the enactment of said Law.

24. The plaintiff and Sheffield Farms Company are the two largest and best advertised milk dealers doing business in the City. Together they have 85% of the retail or house to house business, divided about equally between them, and each has approximately one-sixth of the wholesale business. The plaintiff has 24 branches in the City and serves approximately one-half of the 25,000 stores with some or all of their milk requirements.

25. Until June 1, 1933, bulk milk could legally be sold through stores in New York City and a large amount of Grade "B" milk was sold in that way. On November 20, 1931, a commission, appointed by the Department of Health

of New York City to study the advisability of prohibiting the sale of bulk milk to stores for resale to consumers for consumption off the premises, recommended that the sale of such milk be prohibited. Pursuant to such recommendation, the Board of Health of the said City thereafter made an order to become effective January 1, 1933, prohibiting the sale of bulk milk to stores for resale to consumers. The effective date of said order was subsequently deferred until June 1, 1933.

26. The transition from the sale of bulk milk to the sale of bottled milk to stores in the said City began with the publication of the said Commission's report in November, 1931, and continued until the effective date of the ban on June 1, 1933. During this period, competition for the busi- [fol. 514] ness of selling milk to stores in New York City was intensified by the efforts of all dealers to obtain a larger share of the store trade in bottled milk, and to retain as much trade in bottled milk as they had in bulk milk. Such competition was marked by widespread price cutting and a steadily declining price level.

27. On December 7, 1930, the retail price for Grade "B" milk was 16¢ per quart. Thereafter the following price changes took place:

Date of Change	New Price
December 8, 1930	15
November 2, 1931	14
December 2, 1931	12
December 5, 1932	11
January 23, 1933	10

28. For a number of years before the enactment of the 1933 Law, there was very little price cutting in retail (house to house delivery) sales of milk in New York City. Prices to stores and from stores to consumers were much less uniform than retail prices.

29. From 1931, until the enactment of the 1933 Law, prices of bottled milk sold by stores to consumers were lower than retail prices. The difference varied greatly and was rarely less than 1¢ per quart. In exceptional cases bottled milk was sold by stores at as low a price as 3¢ a quart and sometimes was given away.

30. A large number of stores in New York City which carried the bottled milk of plaintiff and Sheffield Farms Company also carried the bottled milk of independent dealers.

[fol. 515] 31. During 1932, the plaintiff and Sheffield Farms Company made relatively fewer concessions from established sales prices than did the smaller dealers. The principal reason for that difference was that the milk of the two larger companies was sold under well-known brands or trade names which had come to signify extra value in quality and service. Stores found it to their advantage to carry those brands of milk because they were so often called for by the customers. Sales prices of milk distributed by the League in New York City were in practically the same range as those of the independent dealers. (Pitcher Report, pp. 253, 257.)

32. In July, 1931, plaintiff and Sheffield Farms Company dropped the requirement, which all dealers had previously maintained, that a consumer purchasing a bottle of milk from a store in New York City pay, in addition to the price of the milk, a deposit of 5¢ to secure the return of the bottle. Independent dealers continued the deposit requirement. In the fall of 1932, a ... deposit requirement was generally restored by the plaintiff and Sheffield. Dropping the deposit requirement was equivalent to a drop in price of approximately 2¢ per quart.

33. Before November, 1931, plaintiff's wholesale sales of bulk and bottled milk in New York City were approximately 80% bulk and 20% bottled. By June, 1933, the percentages were reversed.

34. Advertising by the plaintiff and Sheffield between the fall of 1932 and the fall of 1933 in newspapers and periodicals extolled the merit of their own milk, and warned the public against buying milk of unknown brands available at a lower price.

[fol. 516] 35. At no time since 1929, has the annual cost of the plaintiff's advertising exceeded one-eighth of 1¢ per quart of bottled milk sold. The plaintiff expended for advertising its products in New York City and vicinity $409,726.93 in 1931, $325,190.29 in 1932, $349,378.01 in 1933, and $386,450.19 in the first eleven months of 1934.

36. The same minimum standards of purity and wholesomeness are required by law for all bottled milk of the same grade sold in New York City. All bottled milk sold in said City is required to have printed on the cap the name of the dealer distributing such milk.

37. The services rendered by the plaintiff and the other well advertised dealers in the sale of bottled milk to stores in New York City did not differ in any respect from the like service rendered by the independent dealers.

38. The Legislature of New York has not at any time adopted any policy or enacted any measure looking toward the suppression or discouragement of the advertising of milk. By Article 25-A of the Agriculture and Markets Law (ch. 822 of the Laws of 1934) a Bureau of Milk Publicity was created by the Legislature with power to carry on an extensive advertising campaign for the purpose of increasing the consumption of milk and the sum of $500,000 was appropriated for this purpose.

39. The Pitcher Report suggested that minimum prices might be fixed for milk and cream sold to consumers and other customers. It made no reference to any differential between minimum prices to be charged for bottled milk [fol. 517] sold to stores in New York City by dealers having well advertised trade names and by dealers not having such names. The bill as drafted by the Committee and introduced in the Legislature contained no provision for minimum prices, or for any differential or various other provisions contained in the law as finally enacted.

40. At meetings of a Committee held in the office of the Assembly Committee on Agriculture in the State Capitol on March 15 and 16, 1933, when a proposal to fix minimum prices to be charged by all dealers to stores was first discussed in connection with the pending Milk Control Bill, it was stated that uniform prices would destroy the business of all dealers except those which were well advertised. The Committee was representative of dealers and producers, advertised and independent, and various members of the Legislature were present from time to time during its discussions on those two days. It was stated on behalf of the independent dealers that there was a custom for their milk to be sold through stores in New York City for a cent a quart less than the milk of the large advertised deal-

ers, that they would lose their business if compelled to sell at the same price as the advertised dealers, and that this would mean a loss of outlet to their producers. Some of the newspaper advertising referred to in finding "34" was at that time shown to certain members of the Legislature.

41. Subsequently, an informal conference of members of both houses of the Legislature was held to consider the pending milk bill. At that conference nearly all members [fol. 518] were present, and Assemblyman Fitzgerald stated that the bill, as proposed, failed to maintain the competitive position then existing between the advertising and non-advertising companies, and, if adopted, would tend to create a monopoly which would eventually raise prices to consumers.

42. Thereafter the bill was amended in the Legislature to include a provision for the fixing of minimum prices; subsequently it was again amended in the Legislature to include a more detailed provision for minimum prices, specifically mentioning stores, and at that time the differential provision was also added.

43. Before the expiration of the 1933 Law, the Milk Control Board made a report to the Legislature recommending the re-enactment of the Milk Control Law with certain proposed amendments. This report made no specific reference to the inclusion of a provision for minimum prices to stores and consumers or to the continuance of the differential. The bill as introduced in the Legislature contained a provision for minimum prices to stores and consumers but did not contain the differential provision, or certain other provisions found in the bill as finally enacted.

44. On March 23, 1934, a hearing on the bill was held before the Senate and Assembly Committees on Agriculture. Witnesses at the hearing urged that the differential provision should be included in the law if it were continued. It was stated that milk consumers in New York City had become accustomed to paying a cent per quart more [fol. 519] at stores for milk of Borden's and Sheffield than for milk of independent dealers, and if all dealers were required to charge the same minimum price, the public would favor the brands of milk which were widely known and widely advertised; that the very existence of the in-

dependent dealers depended upon continuance of the differential provision; that they should be maintained as a gauge of what was economy in the milk business; that to continue price fixing without the differential provision would legislate out of business the independent dealers; that in such case the independent dealers would lose all the store business and their farmers would lose their outlet and the business would be absorbed by the big companies, greatly increasing cost of milk to consumers, particularly the poorer people who bought milk at stores, and putting all producers at the mercy of the three big companies.

45. On May 5, 1933, the Milk Control Board made an order designating the plaintiff, Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company as dealers having well advertised trade names for the purpose of the differential provision. Such order has not since been amended and is in effect and the plaintiff has made no objection to inclusion.

46. Minimum prices from dealers to stores have been fixed at all times since April 17, 1933, except during the period from January 30, 1934 to April 8, 1934, when such prices in New York City were not fixed. While the prices were so fixed, bottled milk of the independent dealers has been sold to and by stores in New York City at 1¢ per quart below the price of the bottled milk of the plaintiff and other [fol. 520] well advertised dealers.

During all that period, the minimum price for the sale of milk by stores to consumers has been fixed at one cent per quart bottle less than the retail price to consumers, and as a result of that difference and the differential provision the milk of independent dealers has been sold to consumers from stores in the City at prices two cents per quart bottle less than the retail prices to consumers. The lower prices from the stores have been applicable only to sales without delivery, and a bottle deposit of three cents must be charged by a store to a consumer, but need not be charged upon a retail sale.

47. At all times since May 16, 1933, the minimum prices which all dealers have been required to pay to producers for milk have been fixed on the basis of the classified price plan. Such minimum prices to producers depend upon the

utilization by the dealer of the milk purchased by him. Milk sold for fluid consumption (Class 1) has at all times commanded the highest price. Since the enactment of the 1933 Law, the independent dealers have continued to sell for fluid consumption a proportionately larger share of the milk purchased by them than the well advertised dealers. Independent farmers are not, however, assured of an outlet at all times for all the milk produced by them.

48. Ten or more States in addition to New York have enacted Milk Control Laws providing for the fixing of prices. In no other State is there a provision for a differential in the prices at which advertised milk and unadvertised milk shall be sold.

49. The people in New York City who come to stores to [fol. 521] purchase their bottled milk are, generally speaking, from the classes having the lowest incomes.

50. Plaintiff filed an application for a license under the 1933 Milk Control Law, in May 1933, in which it stated that the milk sold by it under the trade name of Borden's had been advertised under such trade name since 1857. In the same application, plaintiff agreed to comply with all rules and orders to be made by the Milk Control Board. On August 15, 1933, a license was issued to the plaintiff which expired March 31, 1934. During the continuance of the 1933 Milk Control Law, for a period of nearly twelve months, plaintiff, without formal protest, sold milk under the competitive conditions established by the differential provision.

At no time during the period when the 1933 Milk Control Law was in effect did the plaintiff institute any action or proceeding with reference to the differential provision.

51. The United States Department of Agriculture has kept records for each month during several past years of receipts of milk in the Metropolitan Market. The receipts from November 1929 to December 1934 inclusive, annexed hereto as "Table 1," reflect the trends in sales and consumption of fluid milk in the Metropolitan Market. The receipts of milk (in quarts) for the month of November, for the years 1929-1934, inclusive, were as follows:

Year	Monthly Receipts	Daily Average
1929	121,608,320	4,053,610
1930	118,611,920	3,953,730
1931	112,231,600	3,741,050
1932	107,888,000	3,596,260
1933	104,900,840	3,496,690
1934	102,913,920	3,430,460

[fol. 522] 52. Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 4.9% less than its sales in November, 1932. Total receipts of milk in the Metropolitan Market were 4.6% less in November, 1934, than in November, 1932. Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 1.6% greater than its sales in November, 1933. Total receipts in the Metropolitan Market were 1.9% less in November, 1934, than in November, 1933.

53. Plaintiff's sale of Grade "B" retail (house to house delivery) is its largest single class of business. In November, 1934, it represented 28.5% of its total business. Its daily average sales in New York City for November of the last three years were the following number of quarts:

	1932	1933	1934
Retail to homes	269,053	274,157	270,755
Home relief	(none)	3,813	6,011
Total retail	269,053	277,970	276,766

54. Plaintiff's retail and wholesale sales of milk for the month of November, in 1929, 1932, 1933 and 1934 in the Metropolitan Market were the following number of quarts:

	Retail	Wholesale	Relief	Total	Total excluding relief
1929	24,204,381	11,156,484	.....	35,360,866	35,360,866
1932	18,598,462	11,244,425	.....	29,842,887	29,842,887
1933	17,750,906	9,784,466	385,116	27,920,488	27,535,372
1934	17,972,639	8,784,192	1,619,457	28,376,289	26,756,831

55. Plaintiff's proportion of Metropolitan Market receipts for the month of November, 1929, 1932, 1933 and 1934 as measured by plaintiff's sales and United States Department of Agriculture receipts was as follows:

[fol. 523]

	Total	Total excluding relief
1929	29.1	29.1
1932	27.7	27.7
1933	26.6	26.2
1934	27.6	26.0

56. The proportion of plaintiff's sales of Grade "B" bulk and bottled quarts of milk to (a) stores in New York City and (b) stores outside New York City to the total milk receipts in the Metropolitan Market in November, of each of the following years, was as follows:

	(a) New York City	(b) Outside New York City
1929	6.7%	1.3%
1932	7.7%	1.5%
1933	6.5%	1.7%
1934	5.7%	1.8%

57. Plaintiff's sales of Grade "B" bulk and bottled quarts of milk to stores in New York City for the respective weeks hereinbelow mentioned, were as follows:

	"B" bulk	"B" bottled	Total
1931:			
February 12	1,379,020	379,858	1,758,878
May 14	1,383,137	390,619	1,778,756
August 13	1,485,251	440,419	1,925,670
November 12	1,325,894	447,648	1,773,540
1932:			
February 11	1,010,005	758,576	1,768,581
May 12	908,347	850,059	1,758,406
August 11	1,026,985	1,006,541	2,033,526
November 10	943,147	860,724	1,803,871
1933:			
February 9	885,011	930,315	1,815,326
April 6	861,488	999,955	1,861,443
May 25	767,074	1,126,849	1,893,923
June 8	378,979	1,367,566	1,746,545
August 10	351,512	1,279,108	1,630,620
November 9	346,412	1,203,306	1,549,718
1934:			
February 8	339,582	1,214,096	1,553,678
May 10	369,456	1,279,387	1,648,843
August 9	313,818	1,119,749	1,433,567
November 8	362,474	1,073,348	1,435,822

[fol. 524] 58. Plaintiff's daily average sales in New York City of Grade "B" wholesale for November of the last three years were the following number of quarts.

	1932	1933	1934
Bottled quarts to stores	135,362	182,918	156,417
Smaller bottles to stores	13,547	11,333	10,884
Bulk to stores	145,969	47,363	41,123
School relief	(none)	6,925	13,514
Total (excluding public relief)	294,878	248,539	221,938
Public relief	(none)	(none)	24,868
Total (including public relief)	294,878	248,539	246,806

59. Selling of public relief milk in New York City began about June, 1934, at the request of the Mayor. Such sales are made by independent dealers as well as by the plaintiff and are made only in a limited amount to families duly accredited as needy by the Department of Health. Sales of relief milk are made at Public Health stations in various parts of the City. The plaintiff sells relief milk in paper containers which do not bear its name, but the name is prominently displayed on its cartons, and otherwise. The price is fixed by order of the defendant Commissioner and is now 8¢ per quart, compared with 12¢ (11¢ unadvertised milk) per quart bottle for the same grade of milk through stores and 13¢ retail delivered at the house. The 1933 and 1934 figures used in findings 56, 57, 61 to 63, inclusive, and 65 do not include sales of public or school relief milk.

60. Plaintiff's daily average sales in New York City of Grade "A" milk for November, of the last three years were the following number of quarts:

[fol. 525]

	1932	1933	1934
Retail to homes	172,678	147,515	158,309
Home relief	(none)	380	227
Total retail	172,678	147,895	158,536
Bottled to stores	17,811	17,366	16,553
Bulk to stores	735	1,585	1,321
Total wholesale	18,546	18,951	17,874
Total Grade "A" sales	191,224	166,846	176,410

61. Following is a comparison of the receipts of milk in the Metropolitan Market and plaintiff's sales of Grade "B" bulk and bottled quarts of milk to stores in New York City for the periods specified:

Receipts of Milk in the Metropoitan Market (as Per Cent of Receipts for November, 1929)

May, 1933	June, 1933	November, 1934
93.4	94.6	84.6

Plaintiff's Sales of Grade "B" Bulk and Bottled Quarts to Stores in New York City (as Per Cent of Plaintiff's Sales for Week Ending November 14, 1929)

Week ending May 25, 1933	Week ending June 8, 1933	Week ending Nov. 8, 1934
98.2	90.5	74.2

62. For the week ending June 8, 1933 (the first week after the prohibition of the sale of bulk milk to stores not to be consumed on the premises), plaintiff's sales of Grade "B" bulk and bottled quarts of milk to stores in New York City were 147,378 quarts, an average of 21,054 quarts per day, less than such sales for the week ending May 25, 1933.

63. For the week ending November 8, 1934, plaintiff's sales of Grade "B" bottled quarts of milk to stores in New York City were 294,218 quarts, an average of 42,000 quarts per day, less than such sales for the week ending June 8, 1933.

64. Because of its large retail business, the average of [fol. 526] the plaintiff's entire milk sales is from 2% to 3% higher in November than for the year; the average of milk receipts in the Metropolitan Market in November is from 2% to 3% lower than for the year.

65. For the month of November in 1929, 1932, 1933 and 1934, plaintiff's sales of Grade "B" bulk and bottled quarts to stores were as follows:

	1929	1932	1933	1934
New York City.....	8,180,803	8,350,487	6,828,823	5,845,650
Percentage.....	100	102.07	83.47	71.46
Metropolitan market outside New York City...	1,549,547	1,624,313	1,818,307	1,847,879
Percentage.....	100	104.83	117.34	119.25

66. From November, 1931, to April, 1933, and for several years prior thereto, the independent dealers sold their bottled milk to stores in New York City for resale to consumers at one or more cents per quart below the price at which the advertised dealers were selling their bottled milk to stores in New York City.

67. From November, 1931, to April, 1933, the market for the sale of bulk and bottled milk to and by stores in New York City was in a chaotic condition. Wide variations in the prices charged to and by stores in New York City for the bulk and bottled milk of all dealers existed not only in different sections of the City but also in the same sections. There were repeated price wars resulting in the successive reduction of prices of bottled milk to stores from 13¢ per quart in November, 1931, to 6¢ or less per quart in March, 1933.

[fol. 527] 68. When, during this period, the plaintiff and Sheffield Farms dropped the 5¢ deposit requirement above mentioned, the price at which some independent dealers were selling their bottled milk to stores in New York City for resale to consumers dropped on an average to 2¢ per quart below the price at which the advertised dealers were selling their bottled milk to stores in New York City.

69. During this period, and for several years prior thereto, stores in New York City were selling to consumers the bottled milk of the independents at a price from 1¢ to 2¢ per quart below the price at which they were selling the bottled milk of the advertised dealers.

70. During this period, and for several years prior thereto, independent dealers were selling their bulk milk to stores in New York City for resale to consumers at from 20¢ to 60¢ per 40 quart can below the price at which the advertised dealers were selling bulk milk to stores in New York City.

[fol. 528] CONCLUSIONS OF LAW

1. The plaintiff is not estopped from bringing this suit and asserting the unconstitutionality of Section 258-q of the Milk Control Law of 1934 by having accepted without protest the unadvertised differential provision of the previous Milk Control Law (L. 1933, c. 158), which is substantially similar to the 1934 provision.

2. The differential provision of Section 258-q of the 1934 Milk Control Law, in so far as it prohibits the plaintiff from selling its bottled milk to stores in New York City at as low a price as that at which other dealers are permitted to sell bottled milk to such stores or prohibits such stores from selling the plaintiff's bottled milk to consumers at a price as low as that at which such stores are permitted to sell the bottled milk of other dealers, is discriminatory, arbitrary and unreasonable, and has no relation to any of the objects or purposes for which said law was enacted, and such differential provision is in violation of the Constitution of the United States in that it denies the plaintiff the equal protection of the laws and the due process secured to the plaintiff by the Fourteenth Amendment.

3. By reason of said differential provision, the plaintiff is now suffering, and will continue to suffer, irreparable damage.

4. The plaintiff has no adequate remedy at law.

5. An interlocutory injunction should issue in accordance with the prayer of the amended complaint.

Charles C. Burlingham, Special Master.

Dated, June 17, 1935.

[fol. 529]

TABLE 1

Receipts of Milk in Metropolitan Market. U. S. D. A. Figures, 40-quart Cans)

Year	Month	Receipts for month	Daily average
1929	November	3,040,000	101,333
	December	3,042,000	98,129
1930	January	3,071,499	99,081
	February	2,802,465	100,088
	March	3,057,491	98,629
	April	2,952,755	98,425
	May	3,247,248	104,750
	June	3,109,460	103,649
	July	3,123,323	100,752
	August	2,928,496	94,468
	September	3,126,588	104,220
	October	3,105,995	100,193
	November	2,965,298	98,843
	December	2,979,178	96,103
1931	January	2,942,178	94,909
	February	2,691,765	96,134
	March	2,965,732	95,669
	April	2,864,652	95,488
	May	3,059,034	98,679
	June	3,090,485	103,016
	July	3,231,421	104,239
	August	3,034,113	97,875
	September	3,012,388	100,413
	October	2,984,088	96,261
	November	2,805,790	93,526
	December	2,853,331	92,043
1932	January	2,879,315	92,881
	February	2,742,447	94,567
	March	2,943,896	94,964
	April	2,808,479	93,616
	May	3,006,887	96,996
	June	2,942,255	98,075
	July	3,020,767	97,444
	August	2,905,512	93,726
	September	2,909,954	96,998
	October	2,812,303	90,719
	November	2,697,200	89,907
	December	2,762,296	89,106
1933	January	2,825,663	91,150
	February	2,563,149	91,541
	March	2,794,770	90,154
	April	2,734,359	91,145

TABLE 1—Continued

(Receipts of Milk in Metropolitan Market. U. S. D. A. Figures, 40-quart Cans)

Year	Month	Receipts for month	Daily average
	May	2,933,312	94,623
	June	2,876,899	95,897
	July	2,766,463	89,241
	August	2,793,674	90,119
	September	2,693,911	89,797
	October	2,782,438	89,756
	November	2,622,521	87,417
	December	2,654,614	85,633
1934	January	2,614,380	84,335
	February	2,410,683	86,096
	March	2,691,664	86,828
	April	2,584,871	86,162
	May	2,779,895	89,674
	June	2,773,278	92,443
	July	2,761,508	89,081
	August	2,595,303	83,719
	September	2,583,266	86,109
	October	2,652,943	85,579
	November	2,572,848	85,762
	December	2,542,283	82,009

[fol. 530] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF SPECIAL MASTER

In the Supreme Court the Chief Justice characterized the differential provision in issue thus:

"We have here a novel, if not a unique, provision. The legislature does not purport to exercise an authority merely to fix prices, or minimum prices, or to make different prices for different grades of milk, but attempts to establish for the respective dealers different minimum prices for the same grade of milk, bought and sold at the same time and place and under precisely the same conditions aside from the use of a well advertised trade name. There is no uncertainty as to the effect of the discrimination. As the court below said, the statute seeks to take away from dealers who have well advertised trade names 'economic advantages which were not only theretofore lawful, but which have generally been commended and fostered.' It strikes at the advantage acquired by dealers through the reputation of their brands and the consequent disposition of the public to buy them. * * * It is restricted to the city of New York, and to sales of bottled milk to and by stores. It

does not apply to retail delivery direct to consumers and not through stores. It relates solely to minimum prices. It is not addressed to any practice in the industry, or trade in relation to production, handling or selling, apart from the trade name employed. As to all such matters, a dealer with a well advertised trade name is subject to the same strict requirements as are all other dealers. The price to the producer, the farmer, is not affected by the differential."

[fol. 531] As in the Supreme Court, so here it was urged that the provision was necessary as a precaution against monopoly. As the Chief Justice said, the expressed criterion of the statute

"does not refer to restraint of trade in any of its connotations, or to any coercive action or unfair practice, or to any combination or concert. The provision for the differential is silent as to the use of any monopolizing methods or as to any monopolistic achievement. While dealers having well advertised trade names are grouped for the purpose of the differential, the statute is directed not at concerted action, but at the individual members of the group which are not shown to be, or, for the application of the differential, need not be, in any sort of combination or acting otherwise than in lawful competition with each other as well as with other dealers. The differential hits each dealer having a well advertised trade name regardless of the extent of that dealer's trade. That may be large or small. • • • How much of the trade each of the four distributors may have, does not appear. So far as the criterion of the statute is concerned, that makes no difference. If the statutory provision is sustained as to Borden's, on the simple showing of a well advertised trade name, without more, it must also be sustained as to every other dealer with a well advertised trade name—those now on the list and those which the state authority may hereafter place there —no matter how small a part of the trade the dealer may have, or how independent of any connection with any one else, or how free from any improper trade practice or lacking in monopolistic opportunity, such a dealer may be."

The evidence shows that in November, 1934, the average amount of bottled milk sold by all dealers to stores in New

York City was between 900,000 and 1,000,000 quarts per day, of which the plaintiff sold slightly more than 15%, Sheffield Farms slightly more than 17%, the Dairymen's League and the Renken Dairy Company respectively ½ of 1% and 2½%. Thus to satisfy the requirements of stores at least 650,000 quarts more than the amount sold to them by the large companies must be supplied. (Finding 22.)

[fol. 532] In 1932 there were approximately 83,000 farmers in New York State producing milk for sale. Of these about 31,000 were members of the Dairymen's League Cooperative Association and about 15,000 were members of Sheffield Producers Cooperative Association. The remaining 37,000 were "independent" farmers. Approximately, 50% of the milk produced in New York State was sold in the Metropolitan market; approximately one-third of the milk produced by members of the League was sold to the plaintiff; the remaining two-thirds was sold by the League either directly to consumers or to independent dealers in New York City and elsewhere. Approximately 90% of the milk purchased by the plaintiff was purchased from the League. Sheffield Producers supplied most of the milk sold in New York City by Sheffield Farms Company. (Finding 4.)

As the Pitcher Committee reported, and as I have found, at no time in recent years has any one company had a monopoly, or even a "near monopoly", of the business of the distribution of milk in New York City. (Finding 21.)

The evidence threw no light on the reason for including among the well advertised dealers the Dairymen's League Cooperative Association and the H. Renken Dairy Company, who sold only 3% of the Grade B bottled milk sold by all dealers in New York City per day in the typical month of November, 1934. (Finding 22.) If by combination or otherwise the plaintiff or any of the large companies should endeavor to secure a monopoly of the milk business in New York City the State could invoke the anti-monopoly provisions of the state statutes (General Business Law, Secs. 340-346; Stock Corporation Law, Sec. 14).

Again, at the hearing, as in the Supreme Court, the defendants asserted that "in setting up the differential, the [fol. 533] legislature did not deal with monopoly in the ordinary sense of the term, but with an aggregate of economic advantages, lawfully and severally acquired, and possessed

in varying degrees by the separate concerns having well known brands. The legislature put all these in one class and placed it under a handicap." In justification of this discrimination the defendants contended that "the fixing of the differential was an effort to continue a condition which had obtained before the Milk Control Law was enacted; that, previously, milk of the independent dealers had sold at lower prices than the milk of the well known brands; that in establishing price control, the legislature sought to preserve opportunities in competition which in actual practice the independent dealers had thus enjoyed and to prevent their trade from being destroyed by the operation of the scheme of uniform prices."

Much of the proof was directed to the question whether a similar price difference existed before April 10, 1933, when the first Milk Control law became effective. I have found this to be the fact and that for several years the independent dealers had "sold their bottled milk to stores for resale to consumers at one or more cents below the price" charged by the advertised dealers. (Finding 66.) In my opinion, the previous existence of a difference in price does not afford a reasonable and sufficient basis for a statutory differential.

It is quite apparent how and why the provision for a differential came to be inserted in the 1933 law. No reference to a differential appears in the Pitcher Report, which suggested that minimum prices might be fixed for milk and cream to consumers and other customers. (Finding 39.) The Pitcher bill, as introduced in the Legislature, provided [fol. 534] for the fixing of a minimum price to be paid by dealers to producers and a maximum price to be paid by consumers for milk used for fluid consumption. The next draft of the bill changed this so as to provide that the board of control might fix the minimum price to producers "and/or the prices to be paid by consumers". (Section 312, subd. 2.) The final form of subdivision (b), as enacted, provided that the Board might "fix by official order, the minimum wholesale and retail prices, and * * * the maximum wholesale and retail prices to be charged for milk handled within the State for fluid consumption, and wheresoever produced, including the following classes: 1. By milk dealers to consumers; 2. By milk dealers to stores, either for consumption on the premises or resale to con-

sumers; 3. By stores to consumers except for consumption on the premises where sold."

For several years the independent dealers had enjoyed an advantage over the large, "well advertised" companies in not having to bear any part of the burden of the surplus milk supply. (Findings 12 and 13.) Thus they were able to buy milk and cream cheaper than the large companies and to undersell them. With a minimum price for milk sold by dealers to stores, the independent dealers would lose this advantage; with a differential they could retain it.

The chief purpose of the Milk Control legislation was to improve the economic condition of the farmer-producer (Section 300 of the 1933 law); the secondary purpose was to protect consumers from excessive prices.

The differential provision was an afterthought, put into the bill in the interest of the independent dealers. In the last stages of its progress the 1933 bill was amended by adding the differential clause. There being no legislative report on the amendment, I permitted member of the legis- [fol. 535] lature to testify to what was said in a legislative conference and committee on the subject of a differential. (Findings 40 and 41.) I tried to limit the evidence to facts, but these were scanty; the testimony shaded off into opinions, and afforded little reliable information as to the reasons for the amendment.

That the differential was added for the benefit of the independent dealers is further shown by the fact that by its terms the provision was restricted to dealers who "since April 10, 1933 (had) been engaged continuously in the business of purchasing and handling milk".

The defendants contend that the interest of the independent dealers is also the interest of the farmers; that unless the independent dealers are permitted to undersell the large companies they will lose their store trade to these companies and be driven out of business and that the independent farmers will thus be deprived of the market for their milk; that the independent dealers have very little house-to-house retail delivery trade, the four large companies having 89.2% of it (Finding 20); and finally that the large companies will monopolize the store trade, of which they have 35% already. So far as the dealers are concerned, this seems to me a stronger argument against minimum prices than for a differential.

The voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential. The testimony of the farmers themselves does not support the opinions expressed by dealers, and in fact the whole body of the evidence gives little or no support to the defendents' theory. The chief concern of the grocers and storekeepers who testified seemed to be to hold the store business as against the house-to-house delivery business, and their strongest wish was that a higher price should be fixed for house-delivered than for store-bought [fol. 536] milk. Certainly there is reason for a difference in price between milk bought at a store and that delivered at one's residence.

In my opinion the discrimination between milk dealers who are well advertised and those who are not is arbitrary and unreasonable and was enacted at the instance and for the benefit of a particular class of dealers.

The defendants' amended answer set up a new and affirmative defense, namely, that having applied for and obtained a license under the Milk Control Law of 1933, this plaintiff is estopped from asserting the unconstitutionality of the 1934 law, which was substantially the same as that of 1933.

Both the laws of 1933 and 1934 are in terms emergency measures, each limited expressly to one year. The Act of 1933 provided that on March 31, 1934, the Milk Control Board "created by its terms shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the Board by any article shall terminate". On March 30, 1934, a new law was approved which amended the Agricultural and Markets Law of the State by repealing Articles 21 and 25 of that law and adding new Articles 21 and 21-a. These new articles re-enacted substantially the same provisions as the Act of 1933 with regard to the period of its operation.

It is true that where a party has availed himself of an unconstitutional law for his own benefit, he cannot aver its unconstitutionality as a defense. The right to object may thus be waived and work an estoppel (United Gas Co. v. R. R. Comm'n. 278 U. S. 300).

But this rule has no application here, because the law attacked is the Act of 1934, not the Act of 1933. The plain-
[fols. 537 & 538] tiff made no application for a license under

the 1934 statute, and less than a month after that Act became operative filed its bill of complaint challenging its constitutionality. That the Act of 1934 and the Act of 1933 were substantially similar is immaterial. The waiver of constitutional objections, as in the case of waiver generally, involves the voluntary relinquishment only of rights and privileges which are or should be known to the surrendering party. Plaintiff's application for a license under the 1933 Act was made with knowledge that by its terms the statute would expire March 31, 1934, and did not import any willingness on its part to give up any rights under further legislation on the same subject whether amending, continuing or radically altering that statute. There was no estoppel. Frost v. Corporation Commission, 278 U. S. 515, is conclusive.

Charles C. Burlingham, Special Master.

[fol. 539] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS OF PLAINTIFF TO REPORT OF SPECIAL MASTER

Now comes Borden's Farm Products Company, Inc., the plaintiff in the above-entitled cause, and excepts to the Report of Hon. Charles C. Burlingham, Special Master herein, filed in the Office of the Clerk of this Court on the 20th day of June, 1935, in the following particulars:

1. Plaintiff excepts to Findings of Fact numbered 40, 41 and 44 on the ground that such findings relate to testimony which was incompetent.

2. Plaintiff excepts to Findings of Fact numbered 66, 68, 69 and 70 on the ground that such findings are contrary to the weight of the evidence.

3. Plaintiff excepts to the failure of the Special Master to make the following Findings of Fact:

[fols. 540 & 541] "Sales to consumers of bottled milk at retail by both independent and well advertised dealers have at all times been made at the same price. Sales to consumers of bulk milk of both independent and well advertised

dealers have also been made at the same price. Before November, 1931, bulk milk constituted approximately 75% of the sales of both independent and well advertised dealers to and by stores in New York City, and, together with retail sales, constituted over 90% of the total sales of all milk to consumers in New York City. Before November, 1931, small quantities of bottled milk of independent dealers were sold to and by stores in New York City. Prices were below those generally charged for the bottled milk of the well advertised dealers, but the plaintiff, from time to time, made price concessions for the purpose of meeting competition and in July, 1931, plaintiff and Sheffield Farms Company dropped the 5¢ bottle deposit requirement which all dealers had previously maintained.

"Subsequent to November, 1931, tendencies and conditions in respect of the sale of bottled milk to stores in New York City were materially different from those theretofore prevailing. During this period of transition from bulk to bottled milk, the market for the sale of bulk and bottled milk to and by stores in New York City was in a chaotic condition and the price structure was completely demoralized. There were continuous price wars resulting in wide variations in prices charged to and by stores for the bottled milk of all dealers. During this period and until the enactment of the 1933 Law, prices obtained by milk producers in New York State were less than the cost of production. Because of the low prices at which independent dealers sold bottled milk to stores in New York City, the well advertised dealers made substantial price reductions but did not in general sell bottled milk to stores in New York City at prices as low as those charged by many of the independent dealers."

Dated July 9, 1935.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff.

[fol. 542] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' EXCEPTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTER

1. The defendants except to the Master's refusal to substitute "underselling" for "price cutting" in finding 12.

2. The defendants except to the Master's refusal to include the following before the last sentence in finding 12: "The larger dealers could not do this, since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice."

3. The defendants except to the Master's refusal to find the following instead of finding 17: "From 1930 until the enactment of the 1933 Law, there was a trend from retail sales of bottled milk to sales of bottled milk through stores".

4. The defendants except to finding 23; to the last sentence of finding 26; to the last sentence of finding 32; to [fol. 543] finding 48; and to finding 67.

5. The defendants except to the Master's refusal to find the following heretofore proposed by the defendants:

(a) Since the enactment of the 1933 Law, the sales of some of the independent dealers of Grade "B" bottled milk to stores have declined 20% or more.

(b) When, during the period from November 1931 to April 1933, and for several years prior thereto, some of the independents attempted to sell their bottled milk at the prices which the plaintiff and Sheffield Farms were getting for theirs, the independents making the attempt lost business as a result thereof.

(c) During and prior to the period of transition, given a choice between purchasing at the store a bottle of milk of the plaintiff or Sheffield Farms at the same price as a bottle of milk of an independent dealer, the consumer in New York City almost always chose the bottle of milk of the plaintiff or Sheffield Farms.

(d) If Consumers buying bottled milk in stores in New York City since the enactment of the 1933 Milk Control

Law were not enabled to buy the bottled milk not having well advertised trade names for 1¢ per quart less than the bottled milk having a well advertised trade name, the said consumers would prefer to buy the bottled milk having a well advertised trade name.

(e) If the consumers buying bottled milk in the stores of New York City since the enactment of the 1933 Milk Control Law were not enabled to buy the bottled milk not having well advertised trade names at 1¢ per quart less than the bottled milk having a well advertised trade name, [fol. 544] proportionately more of the bottled milk having a well advertised trade name and less of the bottled milk not having a well advertised trade name is now being bought would be bought in stores in New York City.

(f) If dealers selling milk not having a well advertised trade name had been required, since the enactment of the 1933 Milk Control Law, to sell their milk to stores in New York City at the same price as the milk having a well advertised trade name, the dealers selling the former milk would have lost most of their business of selling bottled milk to stores in New York City.

(g) Most of the business lost by dealers selling milk not having a well advertised name, as stated in the preceding finding, would have been gained by dealers selling milk having a well advertised trade name.

(h) The result of the said loss of the business by dealers selling milk not having a well advertised trade name would have been a narrowing and loss of the outlet of the independent farmers, that is, the farmers supplying the dealers selling to stores in New York City milk not having a well advertised trade name.

(i) On July 14, 1933, when the price fixed by Official Order of the Milk Control Board for sales to stores in New York City of well advertised bottled milk was 9¢ per quart, W. H. Marcussen, Vice-President of the plaintiff, appearing at a hearing of the Milk Control Board, urged that the price for sales to stores in New York City of well advertised milk be increased.

(j) On August 23, 1933, when the price fixed by Official Order of the Milk Control Board for sale to stores in New [fol. 545] York City of well advertised bottled milk was

10¢. Harry A. Cronk, President of the plaintiff, appearing at a hearing of the Milk Control Board, stated that the plaintiff was operating at a loss on its store bottled business in New York City and urged that the price for sales to stores in New York City be increased.

(k) On April 17, 1934, when the price fixed by Official Order for sales to stores in New York City of well advertised bottled milk was 10¢, J. O. Eastlack, statistician for the plaintiff, presented a memorandum on behalf of the plaintiff at a public hearing before the Division of Milk Control, urging that the spread of the milk dealers in the Metropolitan area, including New York City, between the price paid to the farmer (producer) and the price received on sales in New York City, including sales of bottled milk sold under a well advertised trade name, be increased.

(l) The prices at which the not well advertised bottled milk may at present be sold to stores in New York City is 9¾¢ per quart.

6. The defendants except to the Master's refusal to state the following conclusions heretofore proposed by the defendants in place and stead of conclusions of law # 1 to 5 stated by him:

(a) The "unadvertised differential" provision of the 1934 Milk Control Law (Ch. 126 of N. Y. Laws of 1934, section 258-q, last sentence) is not violative of the Fourteenth Amendment of the Constitution of the United States in any matter of which the plaintiff complains, but is constitutional and valid.

(b) Plaintiff, having applied for and received a license [fol. 546] under the 1933 Milk Control Law (ch. 158 Law) which contained an "unadvertised differential" substan- Milk Control Law, and having agreed to be bound by all the rules and orders thereafter made by the Milk Control Board, and having thereby acquired a valuable property right which prevented all unlicensed dealers from competing with it in its business, is now estopped from asserting the unconstitutionality or invalidity of Section 258-q of the Milk Control Law of 1934.

(c) Plaintiff has estopped itself from maintaining this suit by having accepted, without protest for nearly a year before this suit was commenced, the "unadvertised differen-

tial'' provision of the 1933 Milk Control Law (ch. 158 of N. Y. Laws of 1933) which is substantially similar to the 1934 provision, thus permitting and encouraging the existence and continuance during that period of the 1 cent price differential between plaintiff's milk and that of its unadvertised competitors, which differential cannot now be enjoined without great and irreparable damage to such unadvertised dealers; that by reason thereof, plaintiff's prayer for such injunctive relief is inequitable.

(d) Plaintiff has not shown that the operation of the ''unadvertised differential'' provision results in such great or rapid damage to its business as to require redress by injunction, or that any equitable relief is needed or proper, having due regard to the interests of the plaintiff, the unadvertised dealers, and the public interest generally.

(e) Plaintiff has suffered no irreparable loss or damage by reason of the operation of the ''unadvertised differential'' provision.

[fols. 547 & 548] (f) Plaintiff is not entitled to equitable relief by reason of the false and misleading advertisements inserted by plaintiff in newspapers and periodicals in New York City between the Fall of 1932 and the Fall of 1933.

(g) Temporary and permanent injunction should be denied, and the bill of complaint dismissed, with costs to the defendants.

Dated, July 8th, 1935.

John J. Bennett, Jr., Attorney General of the State of New York, by Samuel Kramer, Special Assistant Attorney General; Henry S. Manley, Counsel for Peter G. Ten Eyck, Kenneth F. Fee, etc.

[fol. 549] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC., Plaintiff,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, Defendants

Before L. Hand, Circuit Judge, and Goddard and Coxe, District Judges

On final hearing in a suit in equity to enjoin the defendants from enforcing #258 q. of Article 21-A of the New York Agricultural & Markets Law.

Walter E. Hope for the plaintiff.

Samuel Kramer for the Attorney General and District Attorney.

Henry S. Manley for the Commissioner and Director.

OPINION

L. HAND, Circuit Judge:

This is the same suit as Borden v. Baldwin, 7 Fed. Supp. 352, new defendants having been substituted. In accordance with the directions of the Supreme Court, (293 U. S. 194), the evidence has now been heard at great length by a [fol. 550] special master, who has made findings of fact, has concluded as matter of law that the statute is unconstitutional and has recommended that the defendants be enjoined. It is not necessary for us to repeat the general background of the case; it is contained in the opinion of the Supreme Court; what we have to say is merely in amplification of what was there left open. It now appears that before the agitation which led to the prohibition of the sale of "loose" milk to stores, the "independents" had usually sold bottled milk to stores at one cent a quart less than

"advertised" dealers, and "loose" milk at from half a cent to a cent and a half less. In spite of this the four advertised companies had about one-third of the "wholesale" business, much the greater part of which was "loose" milk. The "independents" were able to undersell in this way because they sold nothing but fluid milk, while a fifth of the "advertised" companies' purchases were sold in the form of "Surplus products", which fetched less in a market subject to wider competition. In November 1931 the report of the commission in this city recommended that the sale of "loose" milk to stores be stopped, and at once began a scramble for the prospective increased bottle market, which demolished the old prices and led to unrestrained price-cutting. The following eighteen months were therefore abnormal, and the legislature might well have thought,—as we should have thought in its place,—that a more reliable indication of the comparative command of the market by the "independents" and "advertised" dealers, was to be found before the industry had been faced with so critical a change. It is true that in July 1931 the plaintiff and Sheffield Farms abandoned the charge of five cents for bottles and this continued until the autumn of 1932; it was [fol. 551] equivalent to a reduction in price of two cents and therefore more than offset the usual differential of the "independents". Although the defendants insist that this bottle charge amounted to less, there is evidence to sustain the finding and we see no reason to upset it. Moreover, on the defendants' own calculation the charge came to a cent and a quarter, which was more than the differential. It must be owned therefore that for five months before the prospective abolition of "loose" milk appeared to complicate the situation, the differential had been variable or had disappeared. Yet even though this period be added to the "chaos" which followed November 1, 1931, there remained a substantial time before July, 1931, and after the autumn of 1932 when the "advertised" brands were apparently able to hold their own at the advance of a cent above the others. The public had come to prefer "advertised" brands, being convinced perhaps by the very advertisements of the plaintiff, which extolled their superior purity. Commercially the brands had come to mean a better grade of milk, for the hygienic properties of a product

do not fix its commercial quality, but the opinion in which buyers hold it. When the legislature therefore came to fix minimum prices in the spring of 1933, it was faced with the fact that there were two grades of milk on the market, in addition to the admitted grades, "A" and "B".

The plaintiff has apparently assumed that this finding is critical in the sense that if it is not true the law cannot stand; hence much of the controversy has centered upon it. That is not so. The issue is not to be treated as the issues in an ordinary suit inter partes, where the court not only selects the applicable legal rules or doctrines, but also determines the issues of fact, as to which its power is im- [fol. 552] mediate, plenary and absolute. It is otherwise when it undertakes to determine whether a statute violates the "due process" clause. We are indeed all familiar with the doctrine that a court will not then substitute its own opinion of what conduces best to the public welfare; there is a large demesne in which the legislative choice between conflicting social values is final, and courts undertake to intervene only when it appears beyond peradventure that that choice has not been defensible. All this is horn-book law and needs no citation; but so far as we can find, the question comes up for the first time whether when the court has undertaken an inquiry as to the facts on which the validity of a statute turns, the result is dependent upon its decision in the same sense as the result of an ordinary suit. If it finds to its own satisfaction that the necessary facts do not exist, is the law invalid? Or must it go further, as in the case of the choice of values, and find not only that the facts did not exist, but that reasonable people could not believe that they did? The question has an especial importance, because the Supreme Court has announced in this very case that the procedure here adopted ought to be generally followed. It seems to us that there can be no doubt that the second is the only tolerable doctrine. Otherwise the legislature's power would in effect be merely to enact general hypothetical propositions, which would become imperative only in case courts concluded that the facts on which their applicability depended, actually existed. That is certainly not the traditional limit of a legislature's powers; frequently it institutes elaborate inquiry to learn the truth, just as it did in this case. The inquiry and its result [fol. 553] are a part of its function, as exempt from judicial review as its social choices. If it has proceeded by com-

mission or the like, the result may be more impressive, but it need not so proceed, and courts are as much bound in the one case as in the other. Therefore it is not necessary for the defendants to demonstrate the truth of the finding as to the differential or of the other findings, though incidentally we think that they are true. The relevant inquiry as to each is not what the master or we, or even the Supreme Court, may think the truth to have been, but whether reasonable people might have taken the view of the legislature. For this reason findings favorable to the statute are in substance conclusive, even if we should not ourselves agree with them; for they prove that the legislature in assuming the truth of what they declare, at least had reasonable warrant, and that, as we have said, is enough, just as it is in the case of a verdict, or of the findings of an administrative tribunal.

The Pitcher Report had indeed recommended minimum prices and had not suggested the need of protecting the "independents". That meant nothing; the effect upon them of fixing a minimum might not yet have been realized. The bill originally did not include any price fixing at all; and the "independents" had no reason for alarm; but it was amended during its passage and with the introduction of a flat price they were naturally aroused and appealed for relief. Why there should be anything sinister about their success, passes our understanding. It is exactly to weigh the two sides of such a controversy that legislatures exist; á priori at least, we cannot see why the plaintiff's interest should be more precious to the public than its competitors', assuming that somebody's ox was bound to be gored. It is then argued that a differential was inconsistent with price fixing. This is true enough when there are no differences in quality, but nobody has ever supposed that prices [fol. 554] should not be stepped to measure grades. Otherwise the whole demand seeks the better grade and the poorer is not sold at all. Now that was really the situation at bar. As we have said, commercially the "advertised" brands had come in the minds of the public to mean a different grade of milk. The public may have been wrong; all milk is subject to the same tests: it may have been right; certainly it was, if the plaintiff's protestations in its advertisements are true. But right or wrong, that is what it believed, and its belief was the important thing. Quite

aside from any other consideration the classification was reasonable, given a policy of price fixing at all.

The plaintiff protests that this is to deprive it of a commercial advantage which it is entitled to exploit to the full; the result of the long established reputation of its milk. If that reputation tells the truth, its milk is really of a different grade, and the classification was right; if it does not tell the truth and the plaintiff has been persistently misleading the public all along, certainly the legislature might neutralize a spurious advantage in order to protect those who have not achieved a similarly undeserved reputation. And quite independently of that, if the legislature really did suppose, as it had been told, that, put on even terms, the "independents" would be put out of the market, it was a tolerable policy not to foster the concentration of a whole market into a few hands, or even into large units. Tax Commissioners v. Jackson, 283 U. S. 527; Liggett v. Lee, 288 U. S. 517; Fox v. Standard Oil Co., 294 U. S. 87. Cheapness and efficiency of production are not the only values which a [fol. 555] legislature may take into account; cheapness and efficiency may perhaps not be confined to large units. The plaintiff replies that, had it been the purpose to fix the differential to correspond with different grades, or to protect the consumer against a concentration of control, the advantage would not have been confined to those "independents" who were in business in April, 1933. Even so, as we said in our first opinion, the inequality, if unfair, did not touch the plaintiff, which has no ground for complaint. But that aside, and for argument acknowledging the justice of this criticism, the statute is not part of the permanent legislation of the state; it is a temporary measure to tide over a crisis. Should it stay on the books long enough, it may lose that character, but the three years, 1933, 1934 and 1935 have not been enough. The state asserts that it looks to the eventual termination of the whole system of price fixing and to a resumption of free competition, and we must take it at its word for a season at least. If so, there was good reason to maintain the general pattern of the market as it was. Price fixing inevitably dislocates economic relations to some extent; that is its purpose. But it is certainly desirable that it should upset them as little as is consistent with its main purpose. That purpose here was to improve the farmers' price at as little increase as possible to the con-

sumer. If the "independents" were eliminated, that was an economic hardship to them; it was permissible as an incident of the plan to prefer their survival to the absorption of the whole market by the "advertised" dealers. Moreover, if they were eliminated, the independent farmers, for whom they constituted the demand, must look elsewhere. [fol. 556] The "advertised" dealers who would presumably take up that part of the market from which they had extruded the "independents", might create a substitute demand, or they might not. Conceivably they might supply the "independents'" old customers out of their surplus, which at the present time is larger than the necessary minimum. The effect of such changes must always rest in supposition; we cannot reason that if one independent farmer loses his customer he will surely get another, or even that the farmer who is to supply the demand of the "advertised" dealer who supplants the "independent", will be benefitted by the change. Economic processes are not so automatic; there is a friction and a lag in them which cause most of our difficulties. The legislature might properly enough wish to make its temporary expedient as painless as possible, maintaining the general pattern of the industry while the exigency existed, restoring it to its former position when normal times returned. We can see nothing unreasonable, arbitrary or unfair in such a purpose.

The plaintiff finally insists that it has been gravely injured in the process; that the differential is out of proportion to its market advantage, assuming that it has any advantage. The evidence of this is not clear. The twenty-third finding says that the "advertised" dealers have lost sales to stores in bottles in larger measure than the "independents"; but the twentieth and twenty-second findings seem to show that between October, 1933, and November, 1934, the proportion rose slightly. It is true that the twentieth finding speaks generally of the "wholesale" market which ordinarily includes sales to hotels and restaurants, [fol. 557] as well as to stores. Of course, it is possible that in 1933 the "loose" milk sold to hotels and restaurants was a smaller proportion of the "wholesale" market than in 1934; but we scarcely ought to assume so. However that may be, the consumption of milk generally has fallen in the past six years; for the "Metropolitan market" it was in 1934 only five-sixths of what it was in 1929. The plain-

tiff's total business has not suffered so severely as that. Its "retail" or house to house sales during the same period fell off from 24,000,000 to about 18,000,000 quarts per month; its "wholesale" from 11,000,000 to about 9,000,000. The proportion is about the same, even if we do not count "relief" milk. Probably "wholesale" here includes more than "store" milk; but it does not in the fifty-seventh finding. This shows the sales to stores of "loose" and bottled milk in representative weeks for four of the six years in question. The totals remained fairly constant until "loose" milk was banned in June, 1933. On the whole it has been dropping since that time, so that for the week of November 8, 1934, it was about 82% of that of June 8, 1933. The "loose" milk sold for the week of August 9, 1934, was about 83% of the week of June 8, 1933, and that for the week of November eighth, about 95%. It is hard to say how much it had fallen. The corresponding figures for bottled milk are about 82% and 79%. From finding fifty-eight, taking November for the years 1933 and 1934, it appears that the bottled milk fell off substantially, if we leave out "relief" milk, but not if we include it. How much the relief milk is a drain on bottled milk sold to stores is uncertain; it may well be for it goes to the same class of consumers, people of little means. In November, 1933, the plaintiff sold 83% [fol. 558] of its 1929 sales of "loose" and bottled milk, in November, 1934, 71-%; it has lost 12%; but this includes bulk milk to stores which fell off daily from 47,000 quarts to 41,000, just about in the same proportion as the total; and it does not include "relief" milk, whatever may be its effect. From all this it seems to us very doubtful whether the differential has really damaged the plaintiff at all.

If it has been damaged, it is because the price difference is greater than its comparative commercial advantage over the "independents". It was obviously difficult in 1934 to find out what that advantage was; only experiment could tell, and the field of experiment was somewhat limited. It may have been possible to fix the differential at a fraction of a cent; the market prices had at times differed by fractions before April, 1933. Conceivably it was also possible to sell to customers at fractions of a cent, though nobody has suggested it. In view of the character of the market it is not likely; and we may properly assume, we think, that if there was to be any differential to customers at all, it

must be at least a cent. In the absence of some disturbing factor the plaintiff's sales are determined by customers' demand; that is, by the customers' price. The only advantage to it if the differential to the stores were a fraction of a cent, would lie in the fact that the retailer who would then by hypothesis have a wider spread, would do his best to push the plaintiff's milk. So far it might profit by a narrow margin; but how far that would help it to hold its place, assuming that it would in fact lose ground, it was quite impossible to forecast. It does not seem to us that [fol. 559] the legislature was compelled to attempt such nice adjustments. It might well reason that a flat price would ruin the "independents", and that a cent differential which the market had carried before would not seriously affect the "advertised" brands. Somebody must stand in hazard and the "independents" had the greater stake. If indeed a flat price would have ruined them, the policy of price fixing would be confiscation; and being a violent intervention into the status quo, their case against the statute would have been better than the plaintiff's is now. The situation is not wholly unlike that in Miller v. Schoene, 276 U. S. 272; given a policy of price fixing, failure to establish a differential would have been affirmative action. It is impossible to avoid damage to someone when the state steps upon the economic scene; vested interests are disturbed because they are meant to be disturbed. We do not see that the plaintiff has pointed out any clearly better course, and we are persuaded that a flat price was not constitutionally necessary.

The master used as the basis for his conclusions two passages from the opinion of the Supreme Court, on the theory, we assume, that they indicated a decided mind about the validity of the section. In following our own unaided judgment we should be much at fault if this is the proper interpretation to put upon that language; so far as we can see it was not so intended. It is true that on pages 205 and 206 the opinion declared that the section gives no evidence of a purpose to prevent monopoly, and that is indubitable, and would have been authoritative, if it were not. But we do not understand by this that the court meant to commit itself even on that question, in case it turned out that a flat price for all would or might, throw all the bottled store market into the hands of four or perhaps [fol. 560] two dealers. Indeed, we can read pages 208 and

209 only as implying that there were relevant issues of fact, or at least issues which might be relevant, and that the result as a whole must be deemed to be in suspense until they were settled. For this reason it has seemed to us that our responsibility remained what it had been before; that we could not with any assurance use the opinion as a guide on the merits of the cause. We should be concerned were there ground to suppose that we were lacking in deference even to the implications of the opinion.

The cause has now been fully heard and is ready for disposition; it should be finally disposed of. A decree will pass dismissing the bill upon the merits with costs.

Borden's vs. Ten Eyck. Alfred C. Coxe.
Borden's vs. Ten Eyck. H. W. G.

[fol. 561] In United States District Court Southern District of New York

Borden's Farm Products Company, Inc., Plaintiff

against

Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, Defendants

Decree

This cause came on to be further heard at the July, 1935, term of this court and was argued by counsel; and thereupon, upon consideration thereof it was

Ordered, adjudged and decreed that the exceptions filed by the plaintiff and the defendants to the findings of the special master be and the same hereby are overruled; and the said findings be and the same hereby are made the findings of this court in conjunction with the following two additional findings:

"71. Independent dealers on some occasions before November 1, 1931, and until April 1, 1933, tried to sell bottled

milk to stores at the same price as that charged by the plaintiff and Sheffield Farms; in each case they were compelled by loss of business to resume their earlier and lower price.

"72. During the period mentioned in finding 71 customers when offered the several brands at the same price would usually take a bottle of the plaintiff's or Sheffield [fol. 562] Farm's milk in preference to that of an independent dealer."

And it was further ordered, adjudged and decreed that the conclusions of law of the special master be and the same hereby are overruled and this court makes its conclusions of law as follows:

"1. The differential provision of Section 258-q. of the Milk Control Law of New York, in so far as it prohibits the plaintiff from selling its bottled milk to stores in New York City at as low a price as that at which other dealers are permitted to sell bottled milk to such stores, or prohibits such stores from selling the plaintiff's bottled milk to consumers at a price as low as that at which such stores are permitted to sell the bottled milk of other dealers, is not discriminatory, arbitrary or unreasonable; does not take the plaintiff's property without due process of law; does not deny it equal protection of the laws; and does not in any other way offend the Fourteenth Amendment to the Constitution of the United States.

"2. That the said section is in all respects a valid exercise of the legislative power of the State of New York, imperative upon the plaintiff.

"3. That the defendants should not be enjoined from compelling the plaintiff to take out a license under said Milk Control Law, or from prosecuting it for any violation of the same.

"4. That the prayer for an interlocutory and a final injunction should be denied and that the bill should be dismissed upon the merits with costs."

And it was further ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dis- [fol. 563] missed upon the merits with costs; and it was

Further ordered, adjudged and decreed that the fee of the special master be and the same hereby is fixed and allowed at $6,000.

Dated July 25, 1935.

Learned Hand, Circuit Judge. Henry W. Goddard, Alfred C. Coxe, District Judges.

[fol. 564] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be further heard at the July 1935 Term of this Court, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that if an appeal be allowed to the plaintiff from the decree heretofore made in this cause on the 25th day of July, 1935, within twenty days after the date hereof, and the plaintiff shall execute and file a bond in the sum of $1,000 conditioned for the payment of all damages which may accrue to the defendants by virtue of this order, the defendants, and each of them, in their respective official capacities, shall be and hereby are enjoined and restrained pending said appeal from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or pro-
[fol. 565] ceeding at law or in equity, or any criminal action or proceeding against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing its business as a milk dealer without having first obtained the license required by Article 21 of the Agriculture and Markets Law of the State of New York, or against any other person, firm, corporation or association, or any officer, agent or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff, or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the license required by

said Article 21 of the Agriculture and Markets Law; provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by said Article 21 of the Agriculture and Markets Law, other than by refusing to agree in writing to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the defendant Commissioner of Agriculture and Markets of the State of New York, and in particular by refusing to agree in writing to sell to stores in the City of New York, and from its stores in the said City to consumers, its fluid milk in bottles at a price not less than the minimum price fixed in applicable orders promulgated from time to time by the [fols. 566 & 567] said Commissioner.

Dated August 15th, 1935.

Henry W. Goddard, United States District Judge.

The undersigned hereby consent to the entry of the foregoing order.

Harry S. Manley, Solicitor for Defendants Peter G. Ten Eyck and Kenneth F. Fee. Samuel Kramer, Special Assistant Attorney General.

[fol. 568] In United States District Court

[Title omitted]

Petition of Plaintiff for Appeal

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

Now comes Borden's Farm Products Company, Inc., the plaintiff in the above entitled cause, and feeling itself aggrieved by the decree made herein on the 25th day of July, 1935, and entered on the 26th day of July, 1935, hereby prays that an appeal may be allowed to it from the said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed herewith, and that a transcript of the record proceedings and papers upon which the said decree was made, duly authenti-

cated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

[fol. 569] And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated, August 14th, 1935.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fol. 570] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Borden's Farm Products Company, Inc., the plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the decree made herein by this Honorable Court on the 25th day of July, 1935 and entered on the 26th day of July, 1935.

I

The United States District Court for the Southern District of New York erred in overruling the Exceptions filed by the plaintiff to the Findings of Fact by the Special Master numbered 40, 41, 44, 66, 68, 69 and 70.

II

The United States District Court for the southern Dis-[fol. 571] trict of New York erred in overruling the Exceptions filed by the plaintiff to the failure of the Special Master to make the Findings of Fact set forth in Paragraph 3 of the said Exceptions.

III

The United States District Court for the Southern District of New York erred in making additional Findings of Fact numbered 71 and 72.

IV

The United States District Court for the Southern District of New York erred in overruling the conclusions of law of the Special Master.

V

The United States District Court for the Southern District of New York erred in denying the interlocutory injunction prayed for by the plaintiff.

VI

The United States District Court for the Southern District of New York erred in denying the permanent injunction prayed for by the plaintiff.

VII

The United States District Court for the Southern District of New York erred in dismissing the bill of complaint upon the merits.

VIII

The United States District Court for the Southern District of New York erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws [fol. 572] of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deprive the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

IX

The United States District Court for the Southern District of New York erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto did not deny the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the plaintiff prays that the aforesaid decree be reversed and that the United States District Court for the Southern District of New York be ordered to enter a decree in accordance with the prayer of the amended bill of complaint or in such form as the Supreme Court of the United States shall deem just.

Milbank, Tweed, Hope & Webb, 15 Broad Street, New York, N. Y., Solicitors for Plaintiff. Timothy N. Pfeiffer, of Counsel.

[fols. 573-591] In United States District Court

[Title omitted]

Order Allowing Appeal

And now, to wit, August 15th, 1935, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above named plaintiff of a bond as required by the law in the sum of Two hundred fifty dollars ($250).

(Sgd.) Henry W. Goddard, United States District Judge.

[fol. 592] Supreme Court of the United States

State of New York,
County of New York, ss:

Thomas P. Farley, being duly sworn, deposes and says: I am over the age of twenty-one years and am employed in the office of Walter E. Hope, counsel for the appellant in the above entitled cause.

On the 26th day of November, 1935, I made service of the within statement of points to be relied upon and designation of the parts of the record to be printed upon Henry S. Manley, Esq., Counsel for the Respondents Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, Samuel [fol. 593] Kramer, Esq., Special Assistant Attorney Gen-

eral, and William C. Dodge, Esq., District Attorney of the County of New York, by depositing in the Grand Central Station, a branch post office maintained by the United States Government in the Borough of Manhattan, City of New York, a true copy thereof duly enclosed in a postpaid wrapper by registered mail addressed to said persons at their respective post-office addresses as follows:

Henry S. Manley. Esq., Department of Agriculture and Markets, Albany, N. Y. Samuel Kramer, Esq., 122 East 42nd Street, New York, N. Y. William C. Dodge, Esq., District Attorney of the County of New York, 137 Centre Street, New York, N. Y.

Thomas P. Farley.

Sworn to before me this 26th day of November, 1935. Pearl E. Loeber. (Seal of Pearl E. Loeber, Notary Public, Kings County.)

Pearl E. Loeber, Notary Public, Kings County.
Kings Co. Clk. No. 353, Reg. No. 7043.
N. Y. Co. Clk. No. 121, Reg. No. 7-L-70.
Bronx Co. Clk. No. 7, Reg. No. 16-L-37.
Queens Co. Clk. No. 1370, Reg. No. 5759.
Certificate filed in Westchester, Richmond, Nassau & Suffolk Counties.
Commission Expires March 30, 1937.

[fol. 594] SUPREME COURT OF THE UNITED STATES

SIRS:

Please take notice that the within is a true copy of the appellant's statement of points to be relied upon and designation of the parts of the record to be printed.

Dated, New York, N. Y., November 26, 1935.

Yours, &c., Walter E. Hope, 15 Broad Street, New York, N. Y., Counsel for Appellant.

To Henry S. Manley, Esq., Counsel for Respondents Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department

of Agriculture and Markets of the State of New York. Samuel Kramer, Esq., Special Assistant Attorney General. William C. Dodge, Esq., District Attorney of the County of New York.

[fol. 595] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Nov. 27, 1935

Comes now the appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point I. That the United States District Court for the Southern District of New York erred in overruling the Exceptions filed by the appellant to the Findings of Fact by the Special Master numbered 66, 68, 69 and 70.

Point II. That the United States District Court for the Southern District of New York erred in overruling the Exceptions filed by the appellant to the failure of the Spec-
[fol. 596] ial Master to make the Findings of Fact set forth in Paragraph 3 of the said Exceptions.

Point III. That the United States District Court for the Southern District of New York erred in making additional Findings of Fact numbered 71 and 72.

Point IV. That the United States District Court for the Southern District of New York erred in overruling the conclusions of law of the Special Master.

Point V. That the United States District Court for the Southern District of New York erred in denying the interlocutory injunction prayed for by the appellant.

Point VI. That the United States District Court for the Southern District of New York erred in denying the permanent injunction prayed for by the appellant.

Point VII. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint upon the merits.

Point VIII. That the United States District Court for the Southern District of New York erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the respondent Commissioner of Agriculture and Markets pursuant thereto did not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Point IX. That the United States District Court for the [fols. 597 & 598] Southern District of New York erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law of the State of New York (as adopted by Chapter 126 of the Laws of 1934) and the orders adopted by the respondent Commissioner of Agriculture and Markets pursuant thereto did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And the appellant further states that the entire record is necessary for consideration in the determination of this cause, but that only such parts of the record, as filed in this Court, need to be printed by the Clerk for the hearing of this cause as are designated in a stipulation entered into between counsel for the respective parties and filed herewith and made a part hereof.

Dated November 26, 1935.

Walter E. Hope, (P. O. Address:) 15 Broad Street, New York, N. Y., Counsel for Appellant.

[fol. 599] SUPREME COURT OF THE UNITED STATES

STIPULATION OF THE PARTS OF THE RECORD TO BE PRINTED

The appellant and the respondents, by their respective counsel, hereby stipulate that the entire record is necessary for consideration in the determination of the above entitled cause but that only the following parts of the record, as filed in this Court, need to be printed by the Clerk for the hearing of this cause:

Title of Paper

(1) Amended bill of complaint verified December 27, 1934 and exhibits annexed thereto.

(2) Order dated December 26, 1934, appointing a Special Master and referring to him plaintiff's application for an interlocutory injunction.

[fol. 600] (3) Amended answer verified January 21, 1935, to amended bill of complaint.

(4) Stipulation dated March 6, 1935, substituting Peter G. Ten Eyck as a party defendant in place of Charles H. Baldwin and order thereon dated March 12, 1935.

(5) Narrative statement of testimony taken before the Special Master.

(6) Plaintiff's exhibits 1, 2, 3, 4, 6, 13, 18-c and 19; Defendants' exhibits 2, 15, 16, 17, 18, 19, 25, 26 for identification, 27, 29, 30, 31 and 34.

(7) Report of Honorable Charles C. Burlingham, Special Master, dated June 17, 1935.

(8) Plaintiff's exceptions to the report of the Special Master.

(9) Defendants' exceptions to the findings of fact and conclusions of law of the Special Master.

(10) Opinion of the court.

(11) Decree dated July 25, 1935.

(12) Order dated August 15, 1935, granting temporary injunction pending appeal.

(13) Petition of plaintiff for allowance of appeal.

(14) Plaintiff's assignment of errors.

(15) Order allowing appeal dated August 15, 1935.

(16) Plaintiff's statement of appellate jurisdiction pursuant to Supreme Court Rule 12, paragraph 1.

All parts of the original record herein, including the exhibits introduced by the appellant and the respondents on the hearing below, which have been omitted from printing shall be deemed to be part of the record before this Court and may be referred to by either party or by their counsel [fols. 601 & 602] in briefs or arguments with like effect as if printed in the record in this Court.

Dated: November 26, 1935.

Walter E. Hope, Counsel for Appellant. Henry S. Manley, Counsel for Respondents Peter G. Ten Eyck and Kenneth F. Fee. Samuel Kramer, Special Assistant Attorney General.

[fol. 603] [File endorsement omitted.]

Endorsed on cover: File No. 40,151. S. New York, D. C. U. S. Term No. 597. Borden's Farm Products Company, Inc., Appellant, vs. Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, et al., etc. Filed November 22, 1935. Term No. 597, O. T., 1935.

FILE COPY

FILED.
NOV 22 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 597

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

vs.

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE.

TIMOTHY N. PFEIFFER,
WALTER E. HOPE,
Counsel for Appellant.

MILBANK, TWEED, HOPE & WEBB,
Of Counsel.

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Chapter 126 of the Laws of 1934 of the State of New York (Laws of New York, 1934, page 564), which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of New York, Section 258-q	2
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity.

No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Plaintiff,

against

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK,

Defendants.

STATEMENT OF BASIS UPON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, Borden's Farm Products Company, Inc., the plaintiff in the

above entitled cause, files this its statement showing the basis upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree appealed from herein, as follows:

I.

The statutory provisions believed to sustain appellate jurisdiction are Section 345 of Title 28 of the United States Code (Judicial Code, Section 238, amended) and Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended).

II.

The statute of the State of New York, the validity of which is involved in this cause, is Chapter 126 of the Laws of 1934 of the State of New York (Laws of New York, 1934, page 564) which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of said State. The said statute provides for the regulation of the purchase, sale and distribution of milk in the State of New York, and requires that the defendant Commissioner of Agriculture and Markets fix the minimum prices at which milk may be purchased and sold in the State. The only part of said statute the validity of which is involved in this cause is the last sentence of Section 258-q which reads as follows:

> "• • • It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised

trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The orders adopted by the defendant Commissioner of Agriculture and Markets, the validity of which is involved in this cause, are Official Order No. 12 designating the plaintiff and certain other milk dealers as having well advertised trade names for the purposes of the section of the statute above quoted, and Official Order No. 74 fixing the minimum prices for the sale of fluid milk in bottles to stores and from stores to consumers in the City of New York and incorporating the provisions of the section of the statute above quoted.

III.

The decree appealed from was made on the 25th day of July, 1935, and entered on the 26th day of July, 1935.

IV.

The application for appeal was presented on the 15th day of August, 1935.

V.

This suit was instituted to restrain the defendants in their respective official capacities from enforcing the provisions of the section of the statute above quoted and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto on the ground that said statute and orders were arbitrary, unreasonable, oppressive and discriminatory and were in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprived the plaintiff of its property without due proc-

ess of law and in that they denied the plaintiff the equal protection of the laws; and further to enjoin the defendants from proceeding in any manner against the plaintiff or any other person, firm, corporation or association by reason of the purchase or sale by them of the plaintiff's fluid milk in bottles at a price as low as that at which the purchase or sale of fluid milk in bottles of any other milk dealer was authorized or permitted.

Equitable jurisdiction was established by reason of the inability of the plaintiff to obtain the license which it was required by law to obtain, unless the plaintiff should agree to comply with and obey the section of the statute complained of and the orders adopted pursuant thereto. Continuation of the plaintiff's business without first obtaining such license rendered the plaintiff and all milk dealers dealing with the plaintiff liable to the imposition of severe penalties and fines and the officers, agents and employees of the plaintiff and of such milk dealers liable to imprisonment.

A temporary restraining order was granted pending the determination of the suit enjoining the defendants from proceeding in any manner against the plaintiff or anyone dealing with the plaintiff by reason of the plaintiff continuing its business without obtaining the required license. A temporary injunction containing similar provisions was granted in an order entered on August 16th, 1935, pending the plaintiff's appeal to the Supreme Court of the United States.

The suit was commenced on April 26, 1934, and the plaintiff's application for an interlocutory injunction was heard before Honorable Learned Hand, Circuit Judge, Honorable Henry W. Goddard and Honorable Alfred C. Coxe, District Judges, specially sitting as a Statutory Court convened pursuant to the provisions of section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended).

By a decree entered on July 5, 1934, the plaintiff's application for an interlocutory injunction was denied and the bill of complaint dismissed (*Borden's Farm Products Co., Inc.*, v. *Baldwin*, 7 Fed. Supp. 352). Upon appeal to the United States Supreme Court the decree of the Statutory Court was reversed and the case remanded with the direction that the plaintiff's motion for an interlocutory injunction should be heard and determined, the case proceed to final hearing upon pleadings and proof, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Co., Inc.*, v. *Baldwin*, 293 U. S. 194). The plaintiff thereafter filed an amended bill of complaint and its application for an interlocutory injunction was referred to Honorable Charles C. Burlingham, as Special Master, to hear and determine. The Special Master made findings of fact and conclusions of law and filed a report in which he recommended that an interlocutory injunction issue in accordance with the prayer of the amended complaint. The plaintiff's motion to confirm the report of the Special Master, and all exceptions filed thereto, were heard before the Statutory Court and thereafter, in conformity with an opinion delivered by Judge Hand, concurred in by the other members of the Court, a decree was made and entered overruling the conclusions of law of the Special Master, denying the plaintiff's application for an interlocutory and a permanent injunction and dismissing the bill of complaint upon the merits.

VI.

The cases believed to sustain appellate jurisdiction are as follows:

Clark v. *Poor*, 274 U. S. 554 (1927);

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245 (1928);

Herkness v. *Irion*, 278 U. S. 92 (1928);
Borden's Farm Products Co., Inc. v. *Baldwin*, 293 U. S. 194 (1934).

Dated August 16, 1935.

MILBANK, TWEED, HOPE & WEBB,
15 *Broad Street, New York, N. Y.*,
Solicitors for Plaintiff.

TIMOTHY N. PFEIFFER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 597

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The appellant has heretofore served upon the counsel for the respondents a statement of jurisdiction, as required by the rules of this Court. No statement has been filed in opposition thereto.

The question involved in this case is the constitutionality of a provision of the New York Milk Control Law which permits the sale of bottled milk not having a well advertised trade name to stores in New York City and by stores to consumers at a price 1¢ per quart below the price at which milk having a well advertised trade name may be sold under similar circumstances. When the case was before this Court at the last term on an appeal from a decision of the District Court convened pursuant to Section 380 of Title 28 of the United States Code (Judicial Code, Section 266) denying the appellant's application for an interlocutory injunction and dismissing the complaint on the merits, the decision below was reversed and the case remanded, with direction that the application for an interlocutory injunction be heard and decided, the cause proceed to final hearing upon the pleadings and proofs, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* v. *Baldwin*, 293 U. S. 194). After a full hearing before a Special Master who made findings of fact and conclusions of law and recommended the granting of an interlocutory injunction in accordance with the prayer of the bill of complaint, the District Court again denied the injunction and dismissed the complaint upon the merits.

The question whether this statutory price differential is constitutional is of vital importance to the appellant and to other milk dealers in New York City, and is likewise of importance in the general administration of the Milk Control Law. The appeal is entitled to preferred and speedy disposition under Section 380 of Title 28 of the United States Code (Judicial Code, Section 266) and under the rules of this Court, and it is desirable that it be finally determined without unnecessary delay.

There is now pending before this Court on appeal from the New York Court of Appeals the case of *Mayflower Farms, Inc.* v. *Baldwin* (No. 349), which involves the constitutionality of so much of the statutory provision for the differential under attack as restricts the benefit of the differential to those dealers who have been continuously engaged in business since April 10, 1933. Since this appeal involves the constitutionality of the entire statutory provision for the differential, a decision of this Court in favor of the appellant would render the *Mayflower* case moot. Counsel for the appellant in that case have requested in their statement of jurisdiction that this Court should first review the narrower question there involved, but counsel for the respondent Commissioner of Agriculture and Markets in his statement opposing jurisdiction has requested that the two appeals be heard together. It is respectfully submitted that the latter course would conserve the time of the Court and make possible a fuller consideration of the related questions raised in the two cases, and would be in conformity with the usual practice of the Court.

It is, therefore, respectfully prayed that probable jurisdiction be found and that this appeal be advanced and set down for argument immediately ahead of the *Mayflower* case or at such other time as the Court shall direct.

Dated November 25, 1935.

WALTER E. HOPE,
(P. O. Address) 15 Broad Street,
New York, N. Y.,
Counsel for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

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Appellant,

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PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, *et al,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

WALTER E. HOPE,
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EDGAR P. BAKER,
of Counsel.

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported in 11 Fed. Supp. 599.

Statute Involved.

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York, added by Chapter 126 of the Laws of New York of 1934 (Laws of New York, 1934, p. 564; R. 35), generally known as the 1934 Milk Control Law.

The only part of the statute the validity of which is challenged in this suit is the last sentence of Section 258-q of Article 21-A which provides as follows:

> "* * * It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city." (Laws of New York, 1934, p. 580; R. 56.)

The foregoing provision is substantially a re-enactment of Section 317 (c) of Chapter 158 of the Laws of 1933 (Laws of New York, 1933, pp. 558, 570; R. 18, 34), generally known as the 1933 Milk Control Law. The 1933 Law was in its broad aspects similar to the 1934 Law; it was professedly of an emergency character and was by its terms to continue for a period of one year only. The 1934 Law was likewise enacted for a period of one year, but its operation was subsequently extended for a further period of one year by Chapter 10 of the Laws of 1935 (Laws of New York, 1935, p. 18).

The differential is effective only in New York City, which is the only city in the State having more than one million inhabitants. Its effect becomes apparent when read in the light of Section 258-m which provides in part as follows:

> "The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and

under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

"(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses * * *.

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. *The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary.*" (Laws of New York, 1934, pp. 575-576; R. 50-52.)

STATEMENT.

Nature of Case.

Pursuant to the Milk Control Law minimum prices to be paid by all dealers to all producers have been fixed. This means that, unless the statute is being violated, the cost to all dealers of any particular grade of milk is uni-

form. Minimum prices for retail sales to consumers by house-to-house delivery have been fixed and they are likewise uniform.

The minimum price fixed for sales to stores (now 10¾¢ per quart) applies, however, only to dealers who have not been continuously engaged in business since April 10, 1933, and to the appellant and three other dealers* who have been designated by official order as having "well advertised trade names" for the purposes of the differential provision. The remaining dealers, some 200 in number, are permitted under the statute to sell their bottled milk to stores at 1¢ less a quart, and all of such dealers have in fact universally taken advantage of this privilege (R. 292, Finding 46). The stores in turn are permitted to sell to consumers the milk of these favored dealers at 11¢ a quart, although 12¢ must be charged for the milk of the appellant.

The appellant challenges this provision of the statute as an unreasonable and arbitrary discrimination against it in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

This suit was originally commenced on April 26, 1934 by an application for an interlocutory injunction pursuant to Section 380 of Title 28 of the United States Code (Judicial Code, § 266). The injunction was denied and the complaint dismissed for failure to state a cause of action (*Borden's Farm Products Company, Inc.* vs. *Baldwin*, 7 Fed. Supp. 352). On appeal to this Court the decision of the District Court was reversed and the case remanded, with direction that the application for an interlocutory injunction be heard and decided, the cause proceed to final hearing upon the pleadings and proofs, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* vs. *Baldwin*, 293 U. S. 194). The appellant subsequently filed an amended complaint and the case was referred to Honorable Charles C. Burlingham as Special Master to hear and de-

* The three other dealers are Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company (R. 35).

termine the application for an interlocutory injunction. After a full hearing the Special Master reported certain findings of fact and conclusions of law and recommended that the interlocutory injunction be granted. The exceptions to the report of the Special Master were heard by the same statutory court of three judges and the Court overruled his conclusions of law, held Section 258-q of the Milk Control Law in all respects constitutional, and again dismissed the complaint upon the merits. The findings of fact recommended by the Special Master were, in form at least, all adopted by the Court, together with two additional findings which he refused to recommend.

Probable jurisdiction was noted by this Court on December 16, 1935.

Statement of Facts.

Background of the Milk Control Law.

The 1933 Milk Control Law had its origin in a serious decline in the price of milk which commenced in 1931. In the Spring of 1932 the New York Legislature appointed a joint legislative committee known as the Pitcher Committee "to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State * * *" (R. 282, Finding 2; Report of the Joint Legislative Committee to Investigate the Milk Industry [hereinafter referred to as the Pitcher Report], Legislative Document (1933) No. 114, p. 9).

The Pitcher Committee found that among the principal factors contributing to such decline in prices were overproduction, unequal distribution of the resulting surplus and the prevalence of unfair and destructive trade practices in the distribution of milk leading to demoralization of prices in the New York Metropolitan market (R. 283, 285, Findings 5, 13; Pitcher Report, pp. 14-17).

After an exhaustive investigation the Pitcher Committee submitted its report to the Legislature early in 1933 and

made recommendations concerning remedial legislation which formed the basis of the 1933 Law. The Committee recommended that uniform minimum prices to the producer be fixed on the basis of the classified price plan discussed below and suggested that minimum prices might be fixed for milk sold to consumers and other customers. It made no reference to any differential or penalty against dealers having "well advertised trade names." The bill as drafted by the Committee and introduced in the Legislature contained no provision for minimum prices on sales by dealers to stores and consumers, but it was subsequently amended in this respect. Just prior to its passage and without further legislative investigation of facts it was again amended to include the differential provision challenged in this suit (R. 290, 291, Findings 39, 42; Pitcher Report, p. 17).

Before the expiration of the 1933 Law, the Milk Control Board, as the agency charged with its administration, made a report to the Legislature recommending the re-enactment of the Law with certain proposed amendments. It made no recommendation with respect to the continuance of the differential provision and the bill introduced in the Legislature contained no such provision (R. 291, Finding 43). Again it was inserted by amendment.

In the report submitted by the Director of the Division of Milk Control to the Legislature in 1935 prior to the extension of the 1934 Law for a further period of one year, the only reference to the differential provision was embodied in a statement that the existence of the differential had resulted in numerous violations of price-fixing orders in New York City and had made the market unstable (R. 155-156).

Thus the extraordinary digression in the field of legislative price-fixing provided by the statutory differential lacks the sanction of the legislative fact-finding body whose report formed the basis of the 1933 Law and of the several State officers and agencies which have been charged with the administration of the 1933 and 1934 Laws.

The various requirements imposed by law as to minimum butter fat content, bacterial count, pasteurization and other matters relating to quality, purity and sanitariness are the same for the milk sold by all dealers in New York City (R. 290, Finding 36); the services performed for the stores by all dealers are the same (R. 290, Finding 37); and the stores have been required since the enactment of the 1933 Law to collect on the sale of bottled milk of all dealers a uniform bottle deposit of 3¢ (R. 292, Finding 46). In other words, the differential imposes different prices for equal products and equal services.

The justification which has been advanced for the statutory differential is founded for the most part upon an alleged difference in price between advertised and unadvertised milk in New York City antedating the Milk Control Law (R. 297, 298, Findings 66, 68-70). Whatever may be the essential accuracy of the findings on this point, which was the subject of a mass of conflicting testimony, the findings standing alone and without appropriate qualification are wholly misleading and, in effect, clearly contrary to the evidence. Prices and price relationships in New York City in the years preceding the Milk Control Law were so intimately connected with and affected by other market conditions that any attempt to express them categorically without reference to attendant circumstances cannot fail to result in error. Chief among the factors affecting the market were the abolition of bulk ("loose" or unbottled) milk and the handling of surplus milk.

The New York City Markets Before the Threat to Bulk Milk.

In most American cities the sale of bulk milk has been prohibited for many years, but it continued to be lawful in New York City until June 1, 1933* (R. 287, Finding 25). Before the Fall of 1931 when there arose the agitation which led to the ban on this method of selling, over 75% of the

* It is still lawful in New York City to sell bulk milk to restaurants and hotels.

milk sold through stores in New York City was sold in bulk form (R. 285, 289, Findings 16, 33). This was true because bulk milk could be purchased in the stores at about 5¢ a quart less than bottled milk and because the price of bottled milk was generally the same in the stores as it was on the dealers' retail routes (Pitcher Report, pp. 246-249). Add that the store purchaser was obliged to make a 5¢ bottle deposit and to put up with the nuisance of returning the empty bottle in order to get back his deposit, and it can readily be seen that there was little incentive for a consumer to buy bottled milk regularly at the stores (R. 289, Finding 32). It is to be inferred that the bottled milk that was sold in the stores consisted largely of extra purchases by consumers who obtained their normal supply as the result of house-to-house deliveries, and of casual purchases by persons who were not in need of a regular supply. The great mass of the store purchasers were not, however, in either of these classes; they were, instead, persons of slender means, or persons who, for one reason or another, were indifferent to sanitary considerations in making their purchases (R. 293, Finding 49). The appeal to these buyers was primarily that of price; and until the abolition of bulk milk became really imminent there was no serious effort by most of the dealers to sell bottled milk to this part of the market. In so far as the dealers were concerned bottled milk sold through stores was a nuisance, and such of the dealers as handled bottled milk at all did so largely in order to assure their retention of the bulk milk business.

The Abolition of Bulk Milk.

The agitation for the abolition of bulk milk finally became so serious in New York City that the board of health appointed a commission to make a study of the question and report on the advisability of effecting such a reform. In November, 1931 this commission recommended that the sale of bulk milk be forbidden and its recommendation was subsequently carried out by an ordinance which, after sev-

eral postponements, became effective on June 1, 1933 (R. 287, Finding 25).

With the end of bulk milk in prospect, everyone in the milk business was of course aware that the character of the preexisting markets was about to be radically changed. The old store market for bottled milk had been distinctly a quality market; it had consisted of persons who were willing to pay 5¢ a quart more for their milk in order to get it in bottles and to deposit another 5¢ a quart for the bottles themselves and put up with the annoyance of returning empty bottles to the stores, or forfeiting the deposit. The bulk milk purchasers, on the other hand, were persons who were interested primarily in price; their acceptance of bulk milk despite its obvious hygienic demerits is proof enough of that; and the proposal was to add them all to the theretofore narrow store market for bottled milk. Since the bulk milk purchasers were about four times as numerous as the store purchasers of bottled milk, this could only mean that the old quality market was to be transformed into one that would respond principally to the appeal of price, a characteristic that was certain to be enhanced by the existing depression. A dealer who could sell bottled milk at a lower price than his competitors was sure to have a very great advantage in the new market; and by reason of certain peculiarities of the milk business, the "independents" were at that time enabled "to engage very generally in price-cutting". (Pitcher Report, p. 17.)

Surplus Milk and the Advantage Derived Therefrom by the "Independent" Dealers.

Milk, unlike most farm products, is produced continuously throughout the year, but the amount is subject to great seasonal variation. Thus the amount produced in the month of June when production is at the peak is usually about twice as great as the amount produced in November when production ordinarily reaches its lowest point. Since milk is a perishable product in daily demand, it is necessary

that the amount produced at the lowest point be adequate to provide for normal demand. The inevitable result is that during the remainder of the year more milk is produced than is required for fluid consumption. This surplus must be utilized in the manufacture of butter, cheese, condensed milk and like products (R. 284, Finding 9; Pitcher Report, pp. 38-40, 120).

Consumption is also subject to seasonal variation, although to a much less extent than production, and is subject in a marked degree to daily fluctuation, depending on the weather, the day of the week, holidays, the current of movement of persons in and out of the City and similar factors. This fluctuation creates a problem for the dealers, since they must be prepared to meet sudden changes in consumer demand on a moment's notice. The appellant and other large dealers have for many years met the problem by contracting with producers' associations for their maximum requirements. Thus they have contracted to take the total output of a sufficient number of producers to assure them an adequate supply in the period of shortest production. The surplus resulting in other periods of the year in the hands of the larger dealers has been disposed of by them in the form of manufactured products. The smaller dealers, on the other hand, have generally contracted only for their minimum requirements and depended upon emergency purchases when threatened with a shortage (R. 285, Finding 13).

Before the Milk Control Law there was not only a difference between the dealers in the methods of providing for consumer demand; there was also a fundamental difference in the basis employed for determining the price of the milk purchased.

Milk used for fluid consumption in New York City must be produced under sanitary requirements which add measurably to the cost of production. Milk used for manufactured products in other parts of the United States and foreign countries is produced under lower cost conditions.

Since similar products manufactured in New York from surplus milk must be sold in competition with those produced elsewhere, surplus milk has always commanded a low price which has been inadequate to cover the higher cost of production in New York (R. 284, Finding 10; Pitcher Report, p. 39).

In order to prevent these lower prices for surplus milk from continually depressing the fluid milk market, the producers' cooperative associations supplying the larger dealers initiated a number of years ago the practice of selling on the basis of what is known as the "classified price plan." Under this plan milk was paid for by the dealer upon the basis of its utilization, milk used for fluid consumption (known as Class 1 milk) commanding the highest price and milk used for various manufactured products commanding successively lower prices. The practice was for the appellant to buy its milk on credit and settle for its purchases after the end of the month. The price then paid was a blended price,—that is, a weighted average of the prices payable for the various amounts of milk utilized for each of the several classified purposes during the preceding month (R. 283-284, Findings 6, 7; Pitcher Report, pp. 109-121).

Prior to the Milk Control Law the "independent" dealers were accustomed to purchase the greater part of their milk from unorganized producers and to pay for such milk a flat price equal to or slightly higher than the blended price paid by the appellant and the other large dealers (R. 284, Finding 11). Thus all producers received approximately the same price for their milk regardless of who was the purchaser. The cost to the advertised and "independent" dealers, however, was very far from being equal because of the fact that the "independent" dealers sold almost entirely for fluid consumption (R. 284, Finding 11; Pitcher Report, p. 96). Since under the classified price plan surplus milk always commanded a lower price than milk sold for fluid consumption (Class 1), the blended price paid by

the larger dealers was always lower than the Class 1 price, the difference depending on the amount of surplus milk and the prices obtainable in the world market. Since the "independents" paid the blended price but sold almost entirely for fluid consumption, their costs were lower than those of the advertised dealers by the amount of this difference between the Class 1 price and the blended price (Pitcher Report, p. 96). Any reduction made in the Class 1 price for the purpose of offsetting this buying advantage on the part of the "independents" necessarily resulted in a lowering of the blended price, which in turn restored the buying advantage. The costs of the advertised and "independent" dealers could not be entirely equalized unless the Class 1 price were reduced to the price of surplus milk, and it was the progressive tendency toward this dangerously low level of milk prices that led to the enactment of the Milk Control Law (Pitcher Report, p. 97).

Under normal conditions the advantage enjoyed by the smaller dealers was not of great significance, except during the season of the peak in the producers' surplus; at other times of the year, when production and the demand for fluid consumption were more nearly equated, the surplus carried by the appellant and the other large dealers greatly decreased, and the blended price more nearly approximated the Class 1 price. For these reasons, under normal conditions, price-cutting by the smaller dealers tended to be a sporadic and seasonal phenomenon. It sprang up in the spring, when the surplus was increasing; but it died down and disappeared under the strong demand of the midsummer months and the diminishing supply of the fall (Pitcher Report, pp. 96-97).

Conditions, however, were by no means normal when the prohibition of bulk milk became effective; or, indeed, when it first was threatened. The depression was far advanced when the Loose Milk Commission was appointed, and consumer demand by that time had so decreased that a huge producers' surplus existed all the year around.

This situation was further aggravated by the fact that the peak of the milk production cycle happened to fall within the period in question. The tendency of milk producers to rear too many heifers when conditions in the milk business are good results in a well-defined cycle of milk production of about 15 or 16 years' duration, the up-swing in which coincided with the period of transition in the New York City markets caused by the ban on the sale of bulk milk (Pitcher Report, pp. 15, 39). As a result of this fortuitous circumstance, the producers' surplus during this period was so great, so continuous, and so dependable, that the host of small dealers in New York City were enabled to dispense with contract-buying altogether; to carry on price-cutting the whole year around; and to cover themselves at almost any price at which they cared to sell, by purchases at depressed prices in the surplus market.

The Bottle Deposit and the Advantage Derived by the Appellant from Abandoning It.

The price-cutting activities of the "independent" dealers began to be observable early in 1931, but it was the publication of the report of the Loose Milk Commission in November of that year which set the price wars going in earnest. The appellant early saw that it had little chance of selling at the same price as the "independents" in so far as it must depend upon the price of the milk it purchased; the best it could hope to do would be to pursue the "independents" down a price-cutting spiral, with the "independents" always one jump in the lead. Rather than pursue this futile course the appellant sought to meet the price-cutting tactics of the "independents" by abandoning, in July, 1931, the 5¢ bottle deposit requirement on store sales (R. 289, Finding 32).

The appellant anticipated that it could do this at a minimum of cost by collecting the empty bottles as it made the rounds of its retail routes. In this it had an advantage

over the "independent" dealers who had very few retail routes and could not respond in kind (Pitcher Report, p. 257). The result was that the total amount paid by the store purchaser for the appellant's milk was less than for that of the "independents," and in addition the purchaser was relieved of the necessity of returning empty bottles to the stores.

As a competitive measure, it proved quite effective.* It was equivalent to a drop in price of approximately 2¢ per quart (R. 289, Finding 32). Some of the "independents" responded by dropping their price to the stores a cent or two, but they all continued their customary 5¢ deposit requirement (R. 289, Finding 32). The cost to the appellant, however, proved somewhat greater than had been expected (Pitcher Report, p. 257). Despite this it continued to do business without a deposit requirement through all the period of the price wars until the Fall of 1932 when, with the first Milk Control Law in prospect and in an effort to stabilize the market in cooperation with a committee of producers, the appellant again asked a bottle deposit on its store sales. But the deposit it then asked was a 3¢ deposit as contrasted with the 5¢ deposit which the "independents" continued to require (R. 289, Finding 32; Pitcher Report, pp. 257, 262).

The Price Wars after November, 1931, and the Enactment of the Milk Control Law.

The publication of the report of the Loose Milk Commission in November, 1931 "was the signal for the launching of intensive drives by large and small distributors for a larger share of the store trade in bottled milk." (Pitcher Report, p. 246.) The increasing amount of surplus milk seeking a market outlet, combined with the resulting ability of the "independent" dealers to purchase their requirements at greatly reduced prices and the effort of the appel-

* The only other dealer adopting this expedient was Sheffield Farms Company, another of the advertised dealers.

lant to offset such buying advantage by abandoning the bottle deposit, rapidly translated these "intensive drives by large and small distributors" into unremitting price warfare. The battle lines were not between "independents" on the one side and the advertised dealers on the other; it was rather a case of every dealer seeking to obtain as much of the market as he could for himself by any means available. The market for the sale of bulk and bottled milk through stores was in a chaotic condition and wide variations in the prices charged for the milk of all dealers existed throughout the City. Widespread price-cutting resulted in a steadily declining price level. The price of bottled milk to stores sank from 13¢ per quart in November, 1931, to 6¢ or less in March, 1933 (R. 288, 297, Findings 26, 67). The prices charged the consumer fell proportionately; stores in exceptional cases sold bottled milk as low as 3¢ per quart and sometimes even gave it away (R. 288, Finding 29).

Thus at no time after bottled milk became an important factor in the wholesale* or store business in New York City were conditions sufficiently stabilized to afford any gauge of normal price relationships. There was complete and continuing chaos from November, 1931, until the Milk Control Law fixed a compulsory bottom for the market.

The cut-throat selling that convulsed the market was primarily at the expense of producers, since dealers had to cover their sales by purchases at comparable figures. Prices fell below the cost of production, farmer bankruptcies became increasingly frequent and a drying up of the public milk supply appeared imminent.

The basic fault in the entire structure was obviously the "independent" dealers' practice of purchasing their fluid milk requirements at lower prices and their resulting ability to engage in price-cutting, which forced the larger

* "Wholesale" as used in the New York City milk trade includes dealers' sales to stores, restaurants, etc., *and* store sales to consumers; "retail" means only house-to-house delivery of bottled milk directly to the consumer (R. 285, Finding 14).

dealers to protect their business by lowering the prices paid to the cooperative associations of producers which supplied them. The only solution for this vicious circle was the universal application of the classified price plan, and this was the principal recommendation of the Pitcher Committee (Pitcher Report, p. 17). This one step might well have been sufficient to remedy the situation, but the Legislature apparently thought it advisable to provide for the fixing of prices all along the line from producer to consumer.

With the enactment of such a statute in prospect the "independent" dealers insisted, and quite justly, that the old practice of selling bottled milk in the stores at the same price as on the retail routes be no longer permitted; with bulk milk about to be outlawed that practice constituted a serious threat to the great majority of "independents" who were not engaged in the retail business. And since there was a real difference in service between the two methods of sale, a compensatory difference in price was justified.

But the "independents" were not content with protection. They realized the character of the market at stake and insisted that the Legislature enact the further differential which the appellant now attacks. They stated to certain members of the Legislature that there was a custom for their milk to be sold through stores in New York City for 1¢ per quart less than the milk of the well advertised dealers and that they would lose their business if compelled to sell at the same price, and in turn their producers would lose the outlet for their milk. They urged the threat of monopoly and eventual higher prices to the consumer (R. 290-291, Findings 40, 41). They even argued paradoxically that fairness required that if they were to be deprived of their buying advantage there should be preserved to them the selling advantage which rested upon it.

The "evidence" thus presented was characterized by the Special Master as follows:

> "The differential provision was an afterthought, put into the bill in the interest of the independent

> dealers. In the last stages of its progress the 1933 bill was amended by adding the differential clause. There being no legislative report on the amendment, I permitted members of the legislature to testify to what was said in a legislative conference and committee on the subject of a differential. (Findings 40 and 41) I tried to limit the evidence to facts, but these were scanty; the testimony shaded off into opinions, and afforded little reliable information as to the reasons for the amendment." (R. 304.)

The pleas of the "independents" were highly successful, and without any attempt to verify the unsupported and self-serving statements made by them, the Legislature inserted the differential in the Law by a last minute amendment (R. 291, Finding 42).

When the bill to re-enact the Milk Control Law came before the Legislature in 1934 the "independents" again marshalled their forces to restore the differential which the Milk Control Board had omitted from the proposed bill which it submitted. In addition to the old arguments, the "independents" urged that store customers in New York City had become accustomed to paying 1¢ more per quart for the milk of the well advertised dealers (R. 291, Finding 44). They neglected to add that by the same token these customers had likewise become accustomed to purchasing far less of the advertised milk since the enactment of the differential! Again the Legislature inserted the differential without further investigation.

In this manner the "independent" dealers obtained what is in effect a monopoly of the right to make a price appeal to the price-conscious consumers who had previously purchased bulk milk; and, to make such monopoly the more secure, the "independents" obtained it not only against the appellant and the other advertised dealers but also against all dealers entering the field after the date of the enactment of the 1933 Law, whether they advertised or not.

The Loss to the Appellant Resulting from the Differential.

There are no findings as to the exact extent of the aggregate losses of all the advertised dealers since the enactment of the Milk Control Law but there are complete findings as to the losses sustained by this appellant. The differential has been in effect since April 10, 1933, but the full force of its impact upon the appellant's business was not felt until after the ban on bulk milk became effective on June 1, 1933. In the week of June 8, 1933, which was the first full week after the ban on bulk milk, the daily average of the appellant's sales of Grade "B" bulk and bottled milk to stores in New York City dropped 21,054 quarts below its daily average during the week ending May 25, 1933, the last full week before the effective date of such ban (R. 297, Finding 62). Since that time the appellant's store sales have diminished steadily except for minor fluctuations due to corresponding variations in general consumption (R. 295, 299, Finding 57; Table I incorporated by reference in Finding 51). For the week ending November 8, 1934, the appellant's daily average sales of bottled milk to stores in New York City were 42,000 quarts below its daily average for the week ending June 8, 1933 (R. 297, Finding 63). The evidence in the record does not cover the appellant's operations since November, 1934.

That the appellant's losses are attributable to the differential is established by the finding that the advertised dealers have had a smaller proportion of the total sales of bottled milk to stores since the enactment of the Milk Control Law than they did before (R. 287, Finding 23). The Court below, however, expressed some doubt whether "the differential has really damaged the plaintiff at all." A study of the reasons assigned by the Court for such doubt reveals that it was occasioned by an incomplete view of the facts appearing in the record and by at least three major errors as to certain of the facts to which the Court did give heed.

(1) The Court below first said that Findings 20 and 22 (R. 286, 287), when taken together, seemed to show that the proportion of store sales of the advertised dealers had risen slightly between October, 1933 and November, 1934. The Court's conclusion evidences a misconception of these findings. Finding 20 relates to the number of milk routes operated by the various dealers and states that in October, 1933 the advertised dealers had 32.6% of the wholesale routes. Finding 22 relates to the amount of bottled milk sold to stores over such wholesale routes and indicates that in November, 1934 the advertised dealers sold approximately 35% of the total. Since there is no necessary relation between the number of routes operated and the amount of bottled milk sold, these findings afford no basis for the inference which the Court sought to draw from them, and there is no inconsistency between them and Finding 23 that the advertised dealers have had a smaller proportion of the store business since the enactment of the Milk Control Law (R. 287, Finding 23).

(2) The Court then pointed out that the consumption of milk generally had fallen in the past six years and that for the Metropolitan market in 1934 it was only five-sixths of what it had been in 1929; it added that the appellant's total business had not suffered so severely. Any conclusions based upon the appellant's total business in the entire Metropolitan market are irrelevant for two reasons. First, the increase or decrease in the appellant's total business does not affect in any manner the loss sustained by the appellant in the sale of bottled milk to stores, to which the differential alone relates; second, the volume of the appellant's business in the entire Metropolitan market* does not afford an accurate gauge since the operation of the differential is confined to New York City. The substantial

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*The New York Metropolitan market comprises all of New York City and certain adjoining parts of New York, Connecticut and Northern New Jersey as shown by a map opposite page 32 of the Pitcher Report (R. 282, Finding 3).

increase in the appellant's store sales in the Metropolitan market outside New York City serves only to emphasize the damaging effect of the differential (R. 295, 297, Findings 56, 65). It may be noted in passing, moreover, that the appellant's total business has not kept pace with the Metropolitan market as a whole. Between 1929 and 1934 there was a percentage decrease in total consumption amounting to 15.4% and a percentage decrease in the appellant's business of 19.8% (R. 294, 296, Findings 54, 61). It would seem, therefore, that the Court was mistaken in the computations which it made.

(3) In analyzing the appellant's sales to stores in New York City, the Court took the month of November, 1933 as a base period for comparative purposes. Since the 1933 Law went into effect on April 10, 1933, the appellant's sales in November, 1933 had already been subjected to the erosive effect of the differential for a period of some six months. The findings include figures for November, 1932 and earlier periods, but for reasons not stated in the opinion the Court chose to ignore them.

If the proper figures are substituted for those used by the Court below it appears that the appellant's daily average store sales in New York City in November, 1932 were 294,878 quarts; in November, 1934 they were 208,424 quarts, and if the debatable item of relief milk is included they were 246,806 quarts, or a loss of 48,072 quarts daily (R. 295, Finding 58). The loss would be somewhat larger if the base were taken closer to the effective date of the differential because both general consumption and the appellant's store business increased between November, 1932 and April, 1933 (R. 295, 299, Finding 57, Table I).

The appellant accedes to the view of the Court below that no losses can be attributed to the differential except those which may be disproportionate to the decrease in general consumption. The decrease in consumption in the Metropolitan market between November, 1932 and Novem-

ber, 1934 was approximately 4.6% (R. 293, Finding 51). The decrease in the appellant's store business (including relief milk in November, 1934) was about 16.3% (R. 295, Finding 58). The difference between these figures, which is not attributable to the decrease in consumption, amounts in terms of quarts to an average loss of 34,501 quarts a day.

It is obviously impossible to prove that all of this loss was caused by the statutory differential. There are the additional hypotheses that the loss resulted from the appellant's inefficiency and that it resulted from a disproportionate shrinkage in the New York City store market. The first of these hypotheses is without support in the record; the second is directly contradicted by the finding that since 1930 there has been a trend from retail sales of bottled milk to sales of bottled milk through stores (R. 285, Finding 17). Furthermore, if either or both of these hypotheses were well founded it would be natural to expect that the appellant's losses had accrued gradually. If, on the other hand, the differential was the effective cause of the losses to the appellant, the greatest single amount of the appellant's losses would occur when the ban on the sale of bulk milk took effect. The shift at such time from bulk milk to the next cheapest thing, which under the statutory differential was the bottled milk of the independent dealers, would naturally result in a substantial and abrupt loss in the appellant's store business, and this we have seen is exactly what occurred. There was a difference of 21,054 quarts between the appellant's daily average store sales in New York City during the last full week before and the first full week after the ban on bulk milk became effective. Such a sudden drop in the appellant's business occurring at that particular time can be explained only as a direct result of the differential. Consumption was then mounting and the appellant's store business had been gaining steadily up to the moment when bulk milk was outlawed (R. 295, 299, Finding 57; Table I).

Whatever may be argued concerning the cause of the additional losses subsequently suffered by the appellant the relation between the differential and this immediate loss of 21,054 quarts daily cannot be impeached.

The Appellant Has No Adequate Remedy at Law.

Under the 1934 Milk Control Law the appellant, as a milk dealer, was required to obtain a license in order to operate after May 1, 1934 (R. 12). Unless such license were obtained the continuance of its business was illegal and likewise it was illegal for the appellant's store customers to purchase milk from it (R. 15). In order to obtain the license the appellant was required to file with the respondent Commissioner an application in which, among other things, it undertook to comply with all rules, price-fixing orders and other orders made by the Commissioner, including the rules and orders relating to the differential in suit (R. 12). The appellant tendered to the Commissioner an application for a license and the fee therefor, and in all respects obeyed the requirements of the Commissioner except that it objected to compliance with the rules and orders relating to the differential. Because of this refusal the appellant's application was rejected (R. 12). The same procedure was followed with the same result in connection with the application of the appellant for a license to operate after May 1, 1935 under the provisions of the Act extending the operation of the 1934 Law for a further period of one year.

When the appellant applied for a license in 1934 its sales of bottled milk in New York City involved several hundred thousand separate transactions daily. Unless the appellant obtained a license, or was protected by injunction, each such transaction rendered the appellant and its officers, agents and employees liable to a penalty of $200 and to fines in an equal amount for each bottle of milk sold, and also rendered the appellant's officers, agents and employees liable to im-

prisonment (R. 13, 62-64). In addition the appellant's store customers were liable to similar penalties, fines and imprisonment (R. 15).

The appellant could not have attempted to challenge the validity of the statute and orders complained of by a single isolated violation. By reason of the differential it has suffered a substantial loss in business in sales to stores in New York City. The forced operation of this part of its business at a price 10% higher than the majority of its competitors has daily subjected the appellant to irreparable injury.

The appellant is now operating under a temporary restraining order granted by Judge Caffey at the inception of this suit and since continued by successive orders of the statutory Court, by the terms of which the respondents are restrained from enforcing against the appellant, or any of its customers, any of the penalties provided in the Agriculture and Markets Law by reason of the appellant operating without a license, so long as it complies with all the provisions of the Law and of the rules and orders of the respondent Commissioner, except those requiring the appellant to agree to obey the rules and orders relating to the differential (R. 12, 322).

Assignment of Errors.

The assignment of errors is as follows (R. 324):

1. The Court below erred in overruling the exceptions filed by the appellant to the findings of fact made by the Special Master numbered 66, 68, 69 and 70 (R. 297, 298).

2. The Court below erred in overruling the exceptions filed by the appellant to the failure of the Special Master to make the finding of fact set forth in paragraph 3 of the said exceptions (R. 306).

3. The Court below erred in making additional findings of fact numbered 71 and 72 (R. 320-321).

4. The Court below erred in overruling the conclusions of law of the Special Master.

5. The Court below erred in denying the interlocutory injunction and the permanent injunction prayed for by the appellant and in dismissing the complaint upon the merits.

6. The Court below erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law and the orders adopted by the respondent Commissioner pursuant thereto did not deprive the appellant of its property without due process of law and did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Summary of Argument.

I. The differential is an arbitrary and unreasonable discrimination which has not been endorsed by any impartial investigating or administrative State agency and has no relation to any difference in cost, quality, service or mode of operation.

II. The differential is directly at variance with the avowed purpose of the Milk Control Law to promote the welfare of producers.

III. The "special" justification heretofore advanced by the respondents based upon a pre-existing difference in price is not borne out by the facts; the radical change which occurred in the New York City market by reason of the abolition of bulk milk precluded the existence of any competitive precedent for the statutory differential.

IV. The differential cannot be sustained as an effort to safeguard existing dealers against injury which might result from the State's emergency price-fixing since serious injury to the appellant was a certainty and has in fact occurred.

V. Neither can the differential be sustained as an effort to preserve the "independent" dealers in the public interest since there is no reasonable ground for believing that they would be eliminated in the absence of the differential.

VI. The differential cannot be justified upon any ordinary principles of price-fixing since it bears no relation to the cost or quality of the product sold or of the services rendered. It is not designed to regulate advertising, nor is it intended to curb monopoly or to preserve freedom of economic opportunity.

VII. The differential is in reality a thinly veiled attempt by the "independent" dealers to preempt the New York City store market.

VIII. The novel character of the differential and the drastic penalty which it imposes require that a clear factual justification for it be shown. Even if a difference in price existed in the New York City market prior to the Milk Control Law, it was not of such a character as to afford a reasonable or sufficient basis for the statutory differential.

IX. The principle involved in the differential is fundamental. To sanction it would lead to dangerous and far-reaching consequences.

X. The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

ARGUMENT

I.

The differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated.

That the differential is discriminatory is immediately self-evident.

The State first prescribes the standards and classifications of milk and the conditions under which it may be sold. The State then proceeds to fix uniform minimum prices to be paid to producers in order that each producer will be assured the same price for the same grade of milk. The State next prescribes minimum prices at which milk may be sold to stores and by stores to consumers, but in so doing it provides that the milk sold by certain dealers must be sold at a higher price than the same grade of milk sold by other competing dealers. Fair and open competition in the sale of the same product in the same manner is forbidden.

The sole distinction upon which this discrimination is based is the possession of a "well advertised trade name." But since any benefit derived from the advertising of a product so essential to health would be immediately lost if the milk were inferior, it is not the fact of advertising which, in reality, constitutes the criterion, but the good reputation which the appellant and other dealers similarly situated have created over a period of years. The "well advertised trade name" is merely the symbol and not the substance of this unusual and drastic penalty.

Certainly the element of advertising, or the possession of a "well advertised trade name", constitutes a wholly artificial and inadequate distinction upon which to base a discrimination so far-reaching in its effect.

The reasonableness of the classification established by the differential is further to be judged in the light of the following considerations:

1. It Has Not Been Advocated by Any Impartial Investigating or Administrative Agency.

The differential was not recommended by the Pitcher Committee after its thorough investigation nor by the State agencies charged with the administration of the 1933 and 1934 Laws. It is not a feature of any considered policy nor the product of careful analysis by the economic and social experts delegated by the State to study the situation and to formulate appropriate remedies.

2. It Has No Relation to Cost.

There is no evidence in the record and no contention has been made that the differential is based upon the cost of advertising or upon the general costs of the advertised dealers in operating their businesses. The appellant's advertising costs are less than one-eighth of a cent per quart of bottled milk sold (R. 289, Finding 35).

3. It Has No Relation to Quality.

The differential is not based upon any difference in the quality of the product sold. The milk which the appellant's competitors may sell at 1¢ less must adhere to the identical classification standards as the appellant's milk (R. 290, Finding 36).

4. It Has No Relation to Service.

The differential is not based upon any difference in the amount or nature of the services rendered. The services performed for the stores by all dealers are the same (R. 290, Finding 37).

5. It Is Not an Attempt to Regulate or Discourage Advertising.

The differential would continue to apply against the appellant regardless of the form its advertising might take, or even if it should cease such advertising altogether.

6. It Is Not Aimed at Unfair Practices.

There was no finding by the Pitcher Committee nor is there any suggestion in the record that the advertised dealers were guilty of any unfair practices.

7. It Is Not Directed Against Monopoly.

The differential is not related to the size or nature of the business of the dealers against whom it applies. Neither in the wording of the statutory provision nor in fact is there any basis for its application other than the possession of that uncertain thing called a "well advertised trade name."

Thus it is clear that the discrimination has no other basis than a difference in reputation or good will. Two competitors may be in all respects alike, but if one has a "well advertised trade name" he is compelled to sell at a higher price and is not permitted to meet on equal terms the competition of rival dealers. The differential has in purpose and inevitable effect the imposition of a penalty upon the reputation of one competitor—upon the good will which constitutes one of his most valuable assets. Such a discrimination is wholly arbitrary and unreasonable.

II.

The differential is directly at variance with the avowed objectives of the Milk Control Law.

The failure of any impartial State agency to endorse the differential is explained not only by its arbitrary and extraordinary character but also by the fact that, far from being in furtherance of the broad objectives of the Milk Control Law, it is directly at variance with them.

The avowed purpose of the Milk Control Law was to assure an adequate price for milk to the producer and thereby to protect the public milk supply from depletion. It is to be presumed that the prices to be charged by dealers were fixed for the purpose of assuring to dealers a reasonable return on their necessary investment and thus relieving the producer's price from undue pressure.

It is expressly provided that the price which the appellant is compelled to charge on sales to stores "shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment", and that the fact that unadvertised dealers avail themselves of the privilege of the differential "shall not require fixing of the price higher than would otherwise be necessary." (Section 258-m, *supra.*)

The unadvertised dealers constitute the mass of dealers in the business and their average efficiency and economy must be the "ordinary" efficiency and economy to which the statute refers. Yet they are permitted to charge 1¢ less for their milk than the theoretically reasonable price fixed for the appellant's sales to stores. Thus the "independent" dealers are encouraged to charge for their milk approximately 10% less than is necessary, on the average, to give them even a reasonable return on their investment. Competition among them has, of course, forced the price for all

down to this theoretically inadequate level. They are by consequence put in a position in which they are continually tempted to "chisel" on the price which the statute has fixed for the protection of the producers and, through that means, for the protection of the public milk supply. This leads to the inevitable defeat of the principal objective of the Law (See the Report of the Director of the Division of Milk Control, R. 155-156).

The only possible escape from this conclusion is to assume that the price which the "independent" dealers are permitted to charge is actually sufficient to assure them a reasonable return on their investment. But if this be assumed, it follows that the real effect of the differential is to compel the appellant to overcharge the public in order to provide a trade advantage for its competitors.

III.

The "special" justification heretofore urged for the statutory differential is not borne out by the facts.

When this case was previously before this Court, a "special" justification was urged for the statutory differential, which, as the appellant understands it, was as follows:

First, the Milk Control Law, with its price-fixing provisions, is an emergency measure. Second, the Legislature will therefore presumably wish at some future time to put an end to the fixing of milk prices. Third, the fixing of a single price for all existing sellers in a particular line of business, when previous competition has included competition on price, is likely to injure those sellers who have previously competed on a low-price basis. Fourth, to guard against such a result, the Legislature in enacting an emergency price-fixing statute may constitutionally con-

tinue previously established competitive price differentials, whilst it provides for a lifting and fixing of the price structure as a whole.

In short, the fixing of the statutory differential was alleged to be "an effort to continue a condition which had obtained before the Milk Control Law was enacted." The existence of competitive precedent for the differential was therefore of the essence of the "special" justification, as it then was urged upon this Court. The investigation of the facts which has since been made disclosed that no such competitive precedent had ever existed.

It needs little argument to show that no competitive precedent for the differential can be found during the period of the price wars beginning in November, 1931; the market situation during that period was highly abnormal, and nothing approaching a stable price structure then existed. Nevertheless, the reluctance of the appellant and certain of the other advertised dealers to go the whole way in meeting the price cuts of some of the "independents"* has led to findings that a difference of one or more cents per quart existed during this period between the prices for bottled milk of the "independents" and of the advertised dealers. As already explained, however, these findings relate to the price of the milk alone, and in failing to recognize the effect of the abandonment of the bottle deposit by the two largest advertised dealers they do not really cover the question at issue. If this factor (which the Court below found was equivalent to a reduction in price of 2¢ per quart) is taken into account, the appellant's bottled milk prices were as low after July, 1931 as were the prices of the "independent" group taken as a whole; and in the case of certain of the more conservative "independents", the appellant's prices were actually lower.

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* It has been found that the prices of the milk that was distributed in New York City by the Dairymen's League were in practically the same range as those of the "independent" dealers (R. 289, Finding 31).

The Court below agreed with all this; but it insisted that the last four or five months of the price-war period had provided a competitive precedent for the differential, because the appellant then had restored its bottle deposit requirement, albeit such requirement was 2¢ less than the deposit asked by the "independent" dealers. The appellant's position is that a practice that had lasted four or five months only was not an established practice nor a competitive precedent, especially under the circumstances then existing which necessarily made the price policies of all dealers entirely provisional.

The Court below seems to have partially conceded the soundness of the appellant's position on this point; for it said in its opinion that it thought—

> "that a more reliable indication of the comparative command of the market by the 'independents' and 'advertised' dealers, was to be found before the industry had been faced with so critical a change [as that which was to result from the abolition of bulk milk]." (R. 313.)

Thus the Court's main reliance was the price relationships that had existed before the appellant abandoned its bottle deposit requirement in July, 1931. In this the Court went astray, for it failed completely to take note of the differences between the old store market for bottled milk, which had existed prior to the threat to bulk milk, and the new store market for bottled milk, which the abolition of bulk milk created. The new market was at least four times the size of the old market; and whereas the old market was obviously and distinctly a quality market, the new market was made up, to the extent of 80% of its total volume, of the old price-conscious purchasers of bulk milk. In view of these circumstances, any competitive difference in price which may have existed in the old market was no more a precedent for the statutory differential than a similar competitive difference in Philadelphia would have been.

There remains only the finding that "independent" dealers were selling bulk milk to stores at prices from 20¢ to 60¢ per 40-quart can below the prices charged by the advertised dealers. It should be observed that there is no finding that stores resold the bulk milk of "independent" dealers at prices lower than those charged for the bulk milk of the advertised dealers. There could be no such difference in price since bulk milk was not sold under trade names and consumers could not tell whose milk they were purchasing. In view of the wide range of prices at which bulk milk was always sold (R. 223, Plaintiff's Exhibit 1) the accuracy of the finding is open to serious doubt, but even assuming that it correctly states the facts it is of no significance whatever in so far as the statutory differential is concerned. It is the difference in price to the consumers that is vital, and there was none in the sale of bulk milk. The mere fact that "independent" dealers may have dissipated some or all of their buying advantage in price reductions on the sale of bulk milk to stores for the purpose of increasing their volume of business affords no warrant for establishing a fixed price differential in the sale of bottled milk to and by stores under radically altered market conditions.

The foregoing considerations make it clear that the statutory differential lacks any competitive precedent sufficient to support it. To the extent, if any, that it crystallized practices obtaining in the market, it did so only in respect of those practices which favored the "independent" dealers without making any allowance for the measures taken by the "advertised" dealers for their own protection. If conditions in the New York City store market before the enactment of the Milk Control Law are to be deemed a factor in determining the validity of the differential, then obviously all such conditions must be taken into account. Taking the weight from only one side of the scales must destroy the balance.

IV.

There could have been no reasonable doubt when the statute was passed that the differential would prove injurious to the appellant and it cannot be justified as an effort to protect existing dealers from losses which might result from the State's emergency price-fixing.

There is in the respondents' "special" justification a hint of a more general contention to the effect that the State, for the purpose of guarding against harm to existing sellers, may indulge in discriminations in emergency price-fixing statutes which would be constitutionally unjustified in permanent measures. The argument then would be that, despite the absence of competitive precedent, there was nevertheless a possibility of harm to the "independents", against which the State might properly protect them.

If the State's purpose were that of protecting existing sellers from possible untoward effects flowing from its emergency acts, the principle of equal protection would certainly require that the State should pursue that purpose with impartiality as between *all* existing sellers, "advertised" and "independent" alike. There is nothing in the nature of the purpose which the argument assumes which could justify discrimination by the State in the conferment of its protection. Since there was certainly no doubt when the statute was passed that the appellant was going to be injured, it follows that the differential cannot be justified on any such theory.

This is true even in the case of the 1933 Law. The size of the old bulk milk market was then well known; its price-conscious character was obvious; and it was certainly inferable that its addition to the store market for bottled milk would make this latter market equally price-conscious. How, then, could it reasonably have been doubted that the

enactment of the differential was going to work an affirmative injury to the appellant? And even if doubt were possible in 1933, none was possible in 1934 and 1935, when the differential was re-enacted. By then the heavy losses which the appellant had sustained in the conduct of its store business were matters of actual fact, not matters of inference, nor was there reasonable ground to doubt that the greater part of these losses was directly traceable to the differential. Whatever may be thought of the first enactment of the differential, the successive re-enactments in 1934 and 1935 certainly cannot be sustained on any theory of making the State's emergency price-fixing "painless."

V.

There was no ground for a reasonable belief by the Legislature that without the statutory differential the "independent" dealers would be eliminated, and the differential cannot be justified as an effort to preserve the "independent" dealers in the public interest.

Perhaps in recognition of the weakness of any argument that the differential had not injured the appellant, the Court below also based its decision on the alternative ground that "assuming that somebody's ox was bound to be gored", the Legislature was free to choose which of the existing dealers it would harm by its price-fixing measures.

The Court, of course, did not hold to the view that the Legislature's choice among the existing dealers could be capricious. Its points were two. It said, first, that "if the legislature really did suppose, as it had been told, that, put on even terms, the 'independents' would be put out of the market, it was a tolerable policy not to foster the concentration of a whole market into a few hands, or even into large units. * * * If the 'independents' were eliminated, that

was an economic hardship to them; it was permissible as an incident of the plan to prefer their survival to the absorption of the whole market by the 'advertised' dealers." (R. 316-317.) Second, it said that if the "independents" were eliminated, "the independent farmers, for whom they constituted the demand, must look elsewhere. The 'advertised' dealers who would presumably take up that part of the market from which they had extruded the 'independents', might create a substitute demand, or they might not. Conceivably they might supply the 'independents' ' old customers out of their surplus, which at the present time is larger than the necessary minimum". (R. 317.)

The Court's view that the Legislature was free to enact the differential with full knowledge that it would injure the appellant was obviously based on the premise that without the differential the "independent" dealers would be eliminated. That idea comes to the surface again and again throughout the opinion. Before considering the entire lack of factual support for such premise a word may be said concerning the resulting plight of the "independent" producers* suggested by the Court.

Although the appellant, unlike the "independent" dealers, contracts through a producers' cooperative association for its maximum requirements, and by consequence purchases a substantial amount of surplus milk, it does not purchase more milk than the exigencies of its business require. The appellant contracts to take all the milk of a sufficient number of producers to assure it an adequate supply during the period of lowest production. Any appreciable increase in the appellant's business would necessitate the taking on of additional producers, since the appellant's supply in the short season would otherwise be inadequate. To argue that the appellant could take care of additional business out of existing surplus involves the proverbial attempt to lift

* The term "independent producer" has generally been used to describe producers who are not members of Dairymen's League Cooperative Association or Sheffield Producers Cooperative Association (R. 283, Finding 4).

oneself by one's own boot straps. The argument is based upon a misconception of the purpose of the appellant in purchasing surplus milk.

But even assuming the worst for the sake of argument, it may be asked why the "independent" producer should be preferred to the organized producers who supply the advertised dealers. Individual producers do not have facilities for manufacturing or otherwise disposing of surplus milk. If there were no agency in the New York milk shed to purchase this surplus milk the attempts of the individual farmers to sell their entire production for fluid consumption would reduce the price of all milk to the low level of milk produced in other parts of the country under lower cost conditions. It was in order to avert this danger that producers formed cooperative associations and initiated the method of selling to dealers on the basis of the classified price plan. Through the medium of the cooperatives a large volume of surplus milk was kept off the fluid market and disposed of in an orderly fashion for manufactured products. But for the united action of the large body of producers who became members of the cooperatives, the price of milk would have sunk to a point below the level necessary to maintain an adequate supply for fluid consumption long prior to 1931, when the increase in the amount of surplus milk which was not subject to the control of the cooperative associations broke the price structure. In view of this, it is difficult to reconcile the penalizing of the organized producers whose efforts have been largely responsible for the survival of the "independent" producers, the more so in the light of the conclusion of the Pitcher Committee that "Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed." (Pitcher Report, p. 17).

Coming back to the premise underlying the Court's argument—that without the differential "independent"

dealers would be eliminated—it should be observed that no finding to that effect was made. The Special Master expressly declined to do so and said:

> "The voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." (R. 305.)

The Court apparently did not disagree with the Master on this point, but made two additional findings to the effect that when the "independent" dealers tried to sell bottled milk to stores at the same price as the advertised dealers they were compelled by loss of business to resume their lower price, and that when customers were offered the several brands of milk at the same price they would usually take the advertised brands (R. 320-321, Findings 71, 72).

These added findings must, of course, be read in the light of the other facts appearing in the record. Prior to the threat to bulk milk most of the "independent" dealers were only incidentally interested in bottled business. While it has been found that a majority of them were selling "some" bottled milk to stores in November, 1931, their quickening interest in this business was a recent development which had evoked the abandonment of the bottle deposit requirement by the appellant some five months before. Under these circumstances it seems a nice question on how many occasions customers were actually "offered the several brands at the same price." This could have happened only in the case of stores handling both "advertised" and "independent" brands. But beyond this, there was, except during the period prior to July, 1931 when the interest of the "independents" in bottled milk was slight, quite literally no possibility of a customer being "offered the several brands at the same price" if all the elements of the customer's purchase are considered. Between July, 1931 and November, 1932 a customer who was offered the several brands "at the same price" was in reality asked to pay for the "independents'" milk 5¢ more

than he was asked to pay for the appellant's, and after November, 1932 he was in reality asked to pay 2¢ more. True, these excess payments for the "independents'" milk could be recovered if the consumer carried back his empty bottles to the store; but one does not have to be an expert in the milk business to see that the consumer's preference would be largely determined in such circumstances by *the apparent price of his purchase.*

It should also be observed that an "independent" dealer selling his milk at the same price (apart from the bottle deposit) as the appellant had to meet the low price competition of other "independent" dealers who were able to, and did, engage very generally in price-cutting.

Other facts of which this Court may take judicial notice further demonstrate the lack of basis for the premise that the "independents" could not survive without the differential. One of the most important of these is the character of the market at stake. The former purchasers of bulk milk were, as a class, largely indifferent to the health appeal upon which the appellant has mainly relied. The appellant does not doubt that a considerable number of these purchasers may prefer its milk; but it sees no reason to suppose that their patronage would exceed in volume the share which the appellant used to have in the bulk milk market. It should also be remembered that consumer preference operates very imperfectly in the store market. A purchaser on a house-to-house route makes a clean-cut decision between the various brands of milk since he is buying milk and nothing else. There is no such clean-cut decision by the store purchaser; most of the milk that is sold through stores in New York City is sold through grocery stores (Pitcher Report, p. 239*); and the consumers who buy their milk through stores buy it, in the main, where they buy the other articles of their food supply. There are doubtless some particular people who will go elsewhere in order to

* The confectionery stores and restaurants, which bulk large in the table referred to in the Pitcher Report, sell for consumption on the premises.

get their favorite brand of milk, but it is unlikely that there are many such persons among the one-time buyers of bulk milk. A storekeeper can sell virtually any brand of milk he wishes, if only its price is right; and, apart from the question of price, the storekeepers' trade is kept by the milk dealer largely on the basis of personal contacts. In the case of large dealers the contact man is the driver on the route; in the case of the smaller dealers, it may be the dealer-proprietor himself. For these reasons, it is quite impossible for the appellant to eliminate the "independents" in the store trade through any advertising appeal to consumers.

It is now over four years since the report of the Loose Milk Commission was made; the threat to bulk milk goes back somewhat further. During all this time, the "independents" have been pushing and selling their bottled milk (See, for example, Plaintiff's Exhibit 13, R. 228). It is undoubtedly true that the majority of them were unknown to the public when the threat to bulk milk first arose, but none of them is unknown, at least to the store-purchasing part of that public, at the present time. Large numbers of persons have been buying bottled milk bearing "independents'" names for the last four years or more and their sales have been increasing in proportion to the total amount of bottled milk sold through stores (R. 287, Finding 23). It is exceedingly unlikely that a legislative—or judicial—declaration that there is no legal basis for a higher charge for the appellant's milk would cause these people to shift their patronage to the appellant, especially in view of the imperfect operation of consumer preference in the store trade alluded to above.

If the danger of elimination of the "independent" dealers were a real one it would be natural to expect that "protective" measures in their behalf would have been enacted in at least some of the numerous other States which have fixed milk prices. The fact is, however, that nothing

in the nature of the statutory differential appears in the legislation of any other State (R. 293, Finding 48). And the differential in the New York Law does not operate outside New York City.

Whatever the Legislature may have thought at the time of the original enactment of the differential in 1933 when the ban on bulk milk was about to become effective, it is clear that in 1934 and 1935 the Legislature could not have entertained a rational belief that a failure to continue the differential would result in the elimination of the "independent" dealers. And looking at the other side of the picture, the injury to the appellant resulting from the differential was then an accomplished fact and daily assuming larger proportions. There was no longer room for speculation as to the probable fortunes of the "advertised" and "independent" dealers under the State's emergency price fixing legislation. The injury to the appellant had been clearly demonstrated and the possibility of regaining lost customers was daily becoming more remote.

VI.

The differential cannot be justified upon any ordinary principles of price-fixing; neither can it be defended as a measure designed to regulate advertising or to curb monopoly or to preserve freedom of economic opportunity.

In addition to the arguments thus far considered a number of others have been advanced in justification of the differential at various stages of these proceedings. Far from strengthening the defense, the multiplicity of these arguments is indicative of the difficulty of finding any tenable ground for justifying this singular piece of legislation. The true explanation of it has been studiously avoided by the respondents, and understandably so.

As one of the many strings to its bow, the Court below seized upon ordinary principles of price-fixing as affording adequate justification. It said that "nobody has ever supposed that prices should not be stepped to measure grades" and argued that "commercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk." It conceded that the public may have been wrong, but said that "right or wrong, that is what it believed, and its belief was the important thing." (R. 315.) The Court also conceded that the differential would deprive the appellant of the commercial advantage of its long established reputation, but it said:

> "If that reputation tells the truth, its milk is really of a different grade, and the classification was right; if it does not tell the truth and the plaintiff has been persistently misleading the public all along, certainly the legislature might neutralize a spurious advantage in order to protect those who have not achieved a similarly undeserved reputation." (R. 316.)

This, we submit, badly confuses three very different things. There is, first, the question of whether a grade and a brand are the same thing; second, the power of the State to deal with unfair methods of competition; and, third, the relevancy of the Court's disapproval of the appellant's methods of advertising.

What the Court disapproved in the appellant's advertising was the repeated claim that the appellant's milk was the best, and its warnings to the public, during the period of the price wars, of the dangers of purchasing milk at the ridiculous prices at which much of the "independent" milk was then being sold.

The appellant has no apologies to offer for its advertising. The warnings which it issued against "bargain" milk were in accord with expert opinion and with the findings

of the Pitcher Committee.* The appellant can see nothing reprehensible in the efforts it made to apprise the public of what, unquestionably, it was in the public's interest to know.

However, if the appellant's reputation for superiority were actually undeserved, it would seem a strange constitutional principle that would permit the State to provide for a perpetuation of the fraud by requiring the appellant to charge for its milk a cent a quart more than the price of other milk which is, by hypothesis, equally good. It would seem much more reasonable—and, therefore, more probably constitutional—for the State to compel the appellant to charge no more for its milk than its more honest competitors.

But the real answer is, of course, that a brand and a grade are not the same, and no amount of playing with words can make them so. The various grades have been defined by the State; if the appellant's milk is superior, the superiority is not of the kind or extent which makes it a different grade. Moreover, the wording of the differential provision does not refer to grades; it refers only to trade names or brands.

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* Pitcher Report, pp. 70-72. Some of the statements there made are:

"The price of milk has a very definite relation to its quality." (p. 70.)

"Of course quality standards for market milk will be maintained during short periods when prices do not fully compensate producers or dealers for the necessary costs. However, an extended period of prices much below the costs of producing milk in accordance with these standards would inevitably have an unfavorable effect upon the quality of the milk supply." (p. 72.)

Dr. Paul B. Brooks, Deputy Commissioner of Health of the State of New York, wrote to the Pitcher Committee: "In my opinion, there is no doubt but that the low price received by the producer for milk and the general disturbed conditions in the milk industry are bound to have an unfavorable effect on the safety and general quality of milk sold in the state." (p. 72.)

Dr. James E. Russell, Chairman of the Milk Committee of the Department of Health of the State of New Jersey, stated: "In the long run, the public will get what it pays for. If sanitary regulations break down and become unenforceable, the public may get a cheap article, but it will not be either safe or wholesome." (p. 72.)

The essence of price-fixing is to fix a single compulsory price for products and services of equal grade; its meaning is that price competition is at an end, and that henceforth all competition shall be on the basis of quality, and selling and productive efficiency. In such a conception, there is no room for unequal prices for things of the same grade, whatever their brands or trade names. It follows that if the differential is to be justified at all, it must be on some other principle than those which lend support to ordinary price-fixing.

Besides the attempted justifications thus far considered, it has been suggested that the differential is an anti-advertising measure; that it is an anti-monopoly measure; and that it is a measure akin to the chain store tax statutes upheld by this Court in *Tax Commissioners* vs. *Jackson*, 283 U. S. 527; *Liggett Co.* vs. *Lee*, 288 U. S. 517; *Fox* vs. *Standard Oil Co.*, 294 U. S. 87. None of these hypotheses fits the case.

In the absence of special considerations such as those present in the trading stamp cases (*Rast* vs. *Van Deman & Lewis Co.*, 240 U. S. 342) the validity of a statute penalizing advertising in an ordinary commercial business is at least open to serious doubt. This Court would appear to have so intimated in its recent decision in *Semler* vs. *Oregon State Board of Dental Examiners*, 294 U. S. 608. There is, however, no occasion to consider this question here for the differential is clearly not an anti-advertising measure. It applies against new-comer dealers, whether they advertise or not; it applies to dealers who have been forced out and obliged to start over, whether they advertise or not; and it would apply to the appellant and the other advertised dealers even though they ceased to advertise. Moreover, it is certain that the State of New York has no policy against promoting the sale of milk through advertising. The State itself is now spending hundreds of thousands of dollars in the advertising of milk, in the hope of increasing

consumption and thereby improving the general condition of the industry (R. 290, Finding 38).

Apart from whether price regulation may be employed to curb monopoly (*Fairmont Creamery Co.* vs. *Minnesota*, 274 U. S. 1; *Williams* vs. *Standard Oil Company*, 278 U. S. 235), it is certain that the differential is not an anti-monopoly measure. The Court below found, as the Pitcher Committee did also, that at no time in recent years has any company had a monopoly, or even a near monopoly, of the business of distributing milk in New York City (R. 287, Finding 21). This finding was fully justified. The appellant in November, 1934 had only 15% of the business to which the differential relates; the Sheffield Farms Company only 17%; and M. H. Renken Dairy Company and Dairymen's League 2½% and ½% respectively (R. 287, Finding 22). The remaining 65% of the store business in New York City was divided among some 200 different dealers. It will be observed that the differential applies against Renken and the Dairymen's League, despite the comparatively small size of their businesses; likewise, that it applies against any dealer who has a "well advertised trade name", without regard to the size of his business; and likewise, that it applies against all new-comers in the milk-dealer field—"infant industries", as one might say—with the same rigor as against large and established businesses like the appellant's. *Mayflower Farms, Inc.* vs. *Baldwin*, 267 N. Y. 9. (An appeal from the decision in this case is pending before this Court [No. 349].)

As for the justification founded on the chain store tax cases, it seems clear that the differential was not intended to foster or preserve free and equal economic opportunity for the public as a whole. If such had been the intent of the statute, its privileges would have been made available to new-comer dealers, to dealers who had been forced out and obliged to start over, and, in general, to all dealers who were still small. Its privileges are not available to

such persons but are the monopoly of the favored group of dealers who were already in the field when the differential was first enacted and who were instrumental in procuring its passage. The present statute is therefore manifestly different in purpose and intent from the chain store tax statutes. Those statutes kept the door of economic opportunity open; the present statute slams it shut.

These same considerations were urged upon the Court below. Its reply was that the appellant could not complain of the effect of the statute upon others; that the exclusion of new-comers from the benefits of the differential was no concern of the appellant's, because the only effect upon the appellant was to make its favored competitors the fewer. The appellant is of course aware that one unaffected by an unconstitutional statute will not be heard to complain of its unconstitutionality; but it has never supposed that one admittedly affected by a statute in suit cannot advert to the irrationalities of a statutory classification in order to show what it was that the Legislature was really doing.

But even assuming, as counsel for the appellant in *Mayflower Farms, Inc.* vs. *Baldwin, supra,* is urging upon this Court, that the limitation of the benefits of the differential to those dealers who have been continuously engaged in business since the date of its original enactment may be stricken out and the remainder of the differential provision preserved, there would even then be no analogy between the differential and the chain store taxes. In the first place there is a well established distinction between tax statutes and police measures, which hardly requires extended comment. See *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S. 540; *Tax Commissioners* vs. *Jackson, supra.* The raising of revenue is a vital governmental necessity, and this Court has been reluctant to throw obstructions in the way of its effective accomplishment. Moreover, it is settled beyond the possibility of controversy that a State is at liberty to put a greater burden on one class of taxpayers than upon

another; i. e., to tax one kind of property, or one type of transaction, and to allow others to go untaxed. The courts are concerned in such cases solely with the question whether the tax imposed operates equitably upon all persons within the class selected to be taxed; and even within a class selected to be taxed, the principle of progression has been repeatedly recognized. The general distinction between tax cases and police power cases would seem to be a sufficient reason for refusing to regard those cases as precedents for differential price-fixing of any kind whatever.

To that is to be added the consideration that the effect of differential price-fixing is very different from the effect of such differential taxation as was involved in the chain store tax cases. Where there is a duty to charge a fixed price which is higher than one's competitors need charge, the handicap involved is immediate, omnipresent, and ineluctable. It is a direct interference with liberty of contract and with the dispositive element of private property. It handicaps one who is subject to it, *vis-a-vis* his customers, on every transaction which he attempts. These things the tax statutes involved in the chain store tax cases quite obviously did not do. They involved no interference whatsoever with contractual liberty or with the use of the taxpayer's property in the conduct of his business; relations with customers were left untouched; and while it is undoubtedly true that a taxpayer under them might conceivably be compelled to increase his prices to avoid insolvency, and thereby be put under a competitive disadvantage somewhat comparable to that imposed on the appellant here, that was obviously not true of all the taxpayers who were subject to them. It was true only of such taxpayers as were unable to pay their taxes out of available profits; all others had actual and effective options. And compulsion upon a necessitous taxpayer may exist with respect to his prices under any kind of tax statute whatsoever. Thus the effect of a differential price-fixing statute is so very different from the effect of the chain store tax statutes

—so much harsher, and so much more arbitrary—that the appellant submits that the doctrine of the chain store tax cases ought not to be extended to differential price-fixing of any kind whatever.

It is not necessary, however, to go quite so far to dispose of the present case. For, even if the principles of the chain store tax cases should be deemed to justify differential price-fixing for the purpose of limiting the growth of large scale economic organization, and of thereby keeping open the door of economic opportunity for the small man, the present statute, even when remade by striking out the limitation directed against newly organized dealers, would not fall within those principles. Even in such form the differential would appl against all milk dealers if their trade names were well advertised, regardless of the size or character of their businesses.

VII.

The differential was in reality a thinly veiled attempt by the "independent" dealers to preempt the New York City store market.

The only conclusion that can be drawn from an analysis of the differential in the light of the circumstances attending its enactment and its necessary effect upon the market to which it relates is that it was a measure deftly suggested by those dealers who were to receive its benefit as a concession which would permit the passage of the statute as a whole. The Special Master aptly described it as an "after-thought". From the point of view of its sponsors it was nothing more or less than a thinly veiled attempt to preempt a definite segment of the New York City market. It was for this reason that the appellant and the other advertised dealers were excluded, regardless of their mode

of operation and regardless of their size; that all newcomer dealers were excluded; and that all dealers who might for any reason be forced out of business and obliged to commence again were also excluded. In this manner everything possible was done to insure to the strongest of the "independent" dealers a monopoly of the store market.

VIII.

The novel character of the differential and the drastic penalty it imposes require that a clear justification for it be shown.

When this case was previously before this Court it was remanded in order that evidence might be taken for the purpose of determining whether any facts existed which would justify the differential. Its "novel, if not unique" character would of itself require that the factual justification for it be clear beyond a doubt. The one thing that the evidence clearly does reveal is the utter confusion which dominated the milk business in New York City in the years immediately preceding the enactment of the Milk Control Law (See pp. 14-15, *supra*). True, the Special Master extricated from this confusion the differences in price between the advertised and unadvertised brands which he embodied in the findings discussed above, but he concluded that under the circumstances "the previous existence of a difference in price does not afford a reasonable and sufficient basis for a statutory differential." (R. 303.)

The Court below, however, did not find it necessary to proceed upon the basis of the facts disclosed in the record. It again resorted to the presumption that the legislation was valid if there were any conceivable state of facts which would support it.

We submit that the conclusion of the Special Master is in accord with the prior decision of this Court and that it

correctly recognizes the basic principle involved. To sanction the differential in the absence of a clear showing of a definitely established and unqualified practice in the trade would make a shambles of legislative price-fixing.

Even assuming the utmost good faith on the part of the Legislature and the most scrupulous regard for the apparent equities of the situation, it must be clear that any attempt to fix prices upon other than the tangible bases of the quality and cost of the goods sold and of the services rendered will lead to serious injustice. The interplay of the countless factors which affect a competitive market is so complex and so difficult of accurate analysis as to proscribe legislative attempts to remedy incidental maladjustments.

The introduction of legislative price-fixing into an industry as highly competitive as the milk business is, of itself, in the nature of an untried experiment which must necessarily disturb existing economic laws and relations. And this is true even if the greatest care be taken to make proper allowances for real differences in quality and service. Once the Legislature goes beyond these recognized bases for establishing price differentials and, in response to the pressure of particular groups, attempts to adjust the ordinary and familiar differences in business relationships, the result is not difficult to foresee. The door is opened to the efforts of competing interests to convert a measure designed for the public welfare into a vehicle for private advantage. Abuse is certain.

Taking at their face value all the arguments urged by the respondents in support of the differential, they are in the last analysis arguments which should properly be addressed to the Legislature on the question of whether the advantages to be derived from the fixing of prices will outweigh the evils which may result. As the Special Master said, they are stronger arguments "*against* minimum prices than *for* a differential." (R. 304.) They do not justify an effort, even though it be a *bona fide* one, to avert a pos-

sible injury to one competitor by inflicting a certain injury on another. Much less do they justify or excuse an arbitrary and unreasonable discrimination "enacted at the instance and for the benefit of a particular class of dealers." (R. 305.)

IX.

The principle involved in the differential is fundamental. To sanction it would lead to dangerous and far-reaching consequences.

The respondents, unlike the Court below, have put their main reliance upon the "special" justification discussed above under Point III. This alleged justification in fact, however, is neither so "special" nor so forceful as to permit the respondents to avoid the fundamental issue which the differential presents.

If such a principle be once approved, limitations upon it would be difficult, if not impossible, to fix. If there may be a differential of one cent, why not two or three? And if there may be a differential for milk having a "well advertised trade name", why not for other products and services in respect of which the State may be empowered to fix prices?

It requires no argument to demonstrate the serious consequences of permitting a legislature, under the pressure of interested groups, to determine that one competitor's product is to enjoy a preference as against another's irrespective of cost, quality or other distinguishing factors. The building up of a good reputation through the sale of an honest product over a long period of years becomes not an asset but a handicap if the Legislature may step in and fix a higher price for such product while it permits a competitor to sell a similar product at a lower price. The competitor with an established reputation is thus denied

the right to meet the price of a lesser known rival. The public is required to pay more for the product which it wants or to abandon it in favor of a less desired product because the Legislature believes, or professes to believe, that one or more competitors are enjoying what the Legislature regards as too large a percentage of the market.

The State can and should take proper measures to see that competitive conditions in general are free from improper restrictions and are fair and equal. But if the Legislature is to be free to intervene in each competitive group in each community and to discriminate between competitors by arbitrarily establishing different prices for the same article, there can be but one result. Political intrigue and the pressure for advantage by one group against another will inevitably lead to oppression. The dangers are not illusory but real and practical ones.

X.

The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

The differential is not an essential nor even a proper part of the price-fixing structure established by the Milk Control Law. The bills recommended by the Pitcher Committee and by the Milk Control Board made no mention of it, and in similar legislation in other States it finds no place. It can be excised without invalidating the remainder of the statute.

Furthermore, in the very section in which the differential is contained the Legislature expressly provided that if any part of the statute should for any reason be adjudged to be invalid, such judgment should not affect, impair or invalidate the remainder of the statute but should be confined in its operation to the part involved in the controversy

in which the judgment should be rendered. There is nothing in the statute to rebut the resulting presumption that the Legislature would have enacted the statute without regard to the differential. *Champlin Refining Company* vs. *Commission*, 286 U. S. 210; *Smith* vs. *Cahoon*, 283 U. S. 553.

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be reversed and a final decree entered for the appellant in accordance with the prayer of the amended bill of complaint.

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Counsel for Appellant.

TIMOTHY N. PFEIFFER,
EDGAR P. BAKER,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

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The Classified Price Plan Before and After the Milk Control Law.

Repeated statements are made in the respondents' brief that the "independent" dealers paid as much or more for their milk as did the advertised dealers prior to the enactment of the Milk Control Law and that the Law imposed upon the "independents" the unfair necessity of paying "for almost *all* of their purchases at a price which the large, well-advertised dealers paid for only a *part* * * *" (pp. 15, 18, 19, 22, 36). The fact is, of course, that before the Milk Control Law the "independents" paid less for the

same grade of milk sold for the same use than did the advertised dealers, and the Law was primarily designed to equalize prices paid to the producers for milk according to its use. The essence of the classified price plan is the relation between price and use, and to speak of prices paid for milk without reference to utilization results in a distorted picture.

The respondents urge that the differential should be sustained because it discriminates in favor of the "independent" producers and against the organized producers by enabling the "independent" dealers to sell a greater percentage of their milk for fluid consumption (p. 43). We had thought this to be an argument *against* the constitutionality of the differential, but apparently the respondents believe that the "independent" producers are entitled to preferred treatment at the hands of the Legislature. As we have pointed out in our main brief (pp. 10-12, 15-16) the willingness of the "independent" producers to sell milk for fluid consumption at reduced prices had the inevitable result of lowering the prices paid to *all* producers, and the Pitcher Committee found that the only permanent solution of the problem of inadequate prices to the producers lay in cooperative action and the universal application of the classified price plan (Pitcher Report, p. 17). The granting of a special privilege to the "independent" producers at the expense of the members of the cooperative associations is not only unfair in itself, but directly opposed to the conclusions and recommendations of the Legislature's investigating Committee.

The Loss to the Appellant.

The respondents question the extent of the loss to the appellant.

In the first week after the ban on the sale of bulk milk, appellant's sales decreased 21,054 quarts per day, and in the ensuing seventeen months the appellant's store sales

decreased by an additional 42,000 quarts per day (R. 297, Findings 62, 63). This decrease in appellant's store business was far in excess of the decrease in general consumption during the same periods (R. 296, Finding 61).

In the period between November, 1932 and November, 1934, the decrease in consumption in the Metropolitan market was approximately 4.6% (R. 293, Finding 51); the decrease in appellant's store business (including relief milk in November, 1934) was about 16.3% (R. 295, Finding 58). The difference between these figures, which is not attributable to the decrease in consumption, amounts in quarts to an average loss of 34,501 quarts per day, or over 230,000 quarts per week. This is a sizable milk business in itself, larger than most of the "independents".

The decrease in the appellant's store business was likewise in excess of the decrease (if there was any) in the store business in New York City, for there has been a continuing trend from retail sales of bottled milk to sales of bottled milk through stores (R. 285, Finding 17) and the advertised dealers have had a smaller proportion of the store business in bottled milk than have the "independent" dealers since the enactment of the 1933 Law (R. 287, Finding 23).

From these findings the Special Master concluded that "By reason of said differential provision, the plaintiff is now suffering, and will continue to suffer, irreparable damage." (R. 299.)

There are no corresponding figures in the record covering the experience of the "independents". The appellant furnished complete data concerning its business. Presumably all available data concerning the business of other dealers was in the possession of the respondents, and it is fair to assume that if it tended to controvert the estimates submitted by the appellant and accepted by the Special Master, it would have been introduced in evidence.

The Differential Is Not Aimed at Monopoly.

The respondents have much to say upon the subject of monopoly and an effort is continually made to create an atmosphere of an octopus crushing out the weak. The Court below found that "At no time in recent years has any one company had a monopoly or even a near monopoly of the business of the distribution of milk in New York City." (R. 287, Finding 21.) The appellant, in November, 1934, had only 15% of the business to which the differential relates; Sheffield Farms Company only 17%; M. H. Renken Dairy Company 2½%, and Dairymen's League ½% (R. 287, Finding 22). It is perhaps unfortunate that the plaintiff here is one of the large companies. If the plaintiff were one of the smaller advertised companies with only a fraction of the business, the issue would then be greatly clarified and the irrelevance of the arguments now made by the respondents as to monopoly, chain stores, etc. would be more readily apparent.

The Appellant Is Not Estopped from Bringing This Action.

It has not seemed necessary to give extended attention to the claim of estoppel raised for the first time by amended answer after reference to the Special Master. It was disposed of by the Special Master by reasoning which seems conclusive (R. 305), and the Court below declined to consider it. The application for a license under a statute which by its terms was to continue for only one year cannot be said to waive rights under a statute subsequently enacted for the succeeding year.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Preliminary Statement.

This is a suit in equity for an injunction to restrain the defendants from enforcing the unadvertised differential provision of the New York Milk Control Law (N. Y. Laws, 1934, Ch. 126, Sec. 258-q).

The suit was commenced on April 26, 1934, in the United States District Court for the Southern District of New York. A Court of three Judges, organized in accordance with Section 266 of the Judicial Code (28 U. S. C., § 380), denied a motion by the plaintiff for an interlocutory injunction, and granted a motion by the defendants to dismiss the bill (*Borden's Farm Products Company, Inc. v. Baldwin*, 7 Fed. Supp. 352). On appeal to this Court the decree was reversed and the case remanded for the purpose of making findings of fact and stating conclusions

(Note:—All italics, except as otherwise indicated, the briefers'.)

of law as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* v. *Baldwin*, 293 U. S. 194).

On December 26, 1934, the District Court made an order appointing a Special Master and referring the case to him to take testimony and to report his findings of fact and conclusions of law thereon (R. 65-66). New pleadings were served and the defendants' amended answer alleged that the plaintiff was estopped from questioning the constitutionality of the act (R. 67-70). Beginning February 4 and ending March 5, 1935, testimony was taken on twelve different days and the stenographic minutes ran to over 1400 pages. The narrative statement covers 150 printed pages (R. 71-221).

The testimony adduced was addressed to three major issues of fact: (1) whether a differential in fact existed at the time milk control was first introduced in New York; (2) what the effect of the elimination of the differential provision from the law would be on the producers, dealers, consumers and the milk market in general; and (3) whether the differential provision in the law caused the plaintiff such losses as would entitle it to injunctive relief in equity.

On the first issue of fact—the pre-existence of a differential—the plaintiff relied almost exclusively on testimony of its own officers and employees and those of its allies—that is, Dairymen's League which supplies almost all of the plaintiff's needs (Finding 4, R. 283), a subsidiary of Dairymen's League, the plaintiff's own subsidiaries, etc.* The defendants on the other hand, in addition to introducing documentary evidence showing the pre-existence of a differential, called seven dealers and ten grocers,

* The plaintiff produced only three witnesses who might be called independent on the issue of the pre-existence of a differential: (1) Herman Allweyer, who retired in 1926 when he sold his business to Dairymen's League (R. 203); (2) John A. Weinsenfluh, who sold his business to the plaintiff in 1924 and was in the brewery business at the time he testified (R. 204); and (3) William J. McKay, whose applications for the 1933 licenses showed that in his own businesses (Waddington Milk Company, Arnstein Beckman Company and McKay Milk Products) he uniformly maintained a differential between his own prices and those of the plaintiff (Defts.' Ex. 15, R. 236-239; R. 86).

whose businesses were scattered throughout the city and whose experience ran back many years, and were prepared to call many more. To shorten the hearings it was stipulated at the suggestion of the Master that twenty-four other named dealers and fifty more grocers could be called by the defendants to testify to the same general effect as those already called (R. 142, 166).

The witnesses called by the plaintiff, testifying from memory, stated generally that based on their knowledge of the trade no differential existed on bottled* milk prior to the introduction of milk control. The defendants' witnesses on the other hand, relying on records some of which were actually produced and others of which were readily available (Defts.' Ex. 2, R. 231-235; R. 209-212; Defts.' Ex. 15, R. 236-239; R. 166-167), testified that a differential had always existed and that they themselves had (in the case of the dealers) actually sold and (in the case of the grocers) actually bought and resold at that differential. The plaintiff did not call one from among the 25,000 storekeepers in New York City to contradict the storekeepers called by the defendants.

The documentary evidence introduced by the defendants on this issue consisted of Table 104 appearing at page 258 of the Pitcher Report,** a communication from Professor Leland Spencer, Research Director of the Pitcher Committee and Editor of the Report, confirming the accuracy of the table (R. 186-187), and a summary of the applications for licenses filed by fifty-three dealers in New York City with the Milk Control Board when milk control was first introduced in New York (Defts.' Ex. 15, R. 236-239). The table, based on a survey made during the week of October 17, 1932 (Pitcher Report, p. 239), shows that the custom was for unadvertised grade B bottled milk to be sold in stores at a price below that of the well advertised milk and Professor Spencer states that this survey is

* One of the plaintiff's chief witnesses admitted that a differential existed on bulk (loose) milk (R. 78).

** At the hearings it was stipulated that the Master and the Court may take judicial notice of anything appearing in the Pitcher Report (R. 81).

fairly representative of tendencies and conditions in 1932 and early 1933—up to the time of milk control (R. 187). Defendants' Exhibit 15 shows that in their applications for licenses the unadvertised dealers reported that before milk control they sold their bottled milk to stores at one cent or more below the prices which the plaintiff reported in its application.

On the second issue of fact—the effect of the elimination of the differential provision—two dealers, who had sold their businesses to Dairymen's League and remained as managers of the establishments which were continued as subsidiaries of the League, testified that when in 1931 and 1932—before milk control—they attempted, under instructions from Dairymen's League, to raise their prices on bottle milk to stores to the level of those of the plaintiff, they incurred heavy losses in sales and were obliged, again under instructions from Dairymen's League, to restore the differential (R. 115, 120, 121); a third testified that he lost all of his store bottle business when he made a like attempt in 1927 (R. 142); a fourth testified that the part of his business which is in Freeport, L. I., where the differential provision does not apply, dropped from 450 to 100 cases daily after milk control introduced uniform prices and eliminated the differential previously existing in Freeport (R. 119); and some of the grocers testified that when they attempted to get the same price for unadvertised milk as for the plaintiff's, they invariably, after control as well as before, met with failure R. 159, 130).* All of the grocers were agreed that if they were compelled to sell all milk at the same price, the sale of unadvertised milk would decline to the vanishing point and the sale of well-advertised milk would be increased correspondingly (R. 130, 143, 157, 159, 161, 162, 163, 165).

The testimony introduced on this issue by the defendants went unchallenged; the plaintiff did not call a single storekeeper from among the 25,000 in New York City to testify that all milk could be sold at the same price.

* Most of the grocers apparently thought it fruitless even to try to get the same price.

The third issue of fact—the effect of the differential provision on the plaintiff—is treated in detail under Point II, *post*, and needs no consideration here.

On the testimony thus briefly sketched the Master found that a differential, both in bottled and bulk (loose) milk, in fact existed for many years prior to the introduction of milk control (Findings 66, 69, 70, R. 297-298); refused, as speculative, to find what the effect of the elimination of the differential provision would be (R. 305); concluded that the plaintiff has suffered irreparable injury; held that "the previous existence of a difference in price does not afford a reasonable and sufficient basis for a statutory differential" (R. 303); declared the provision unconstitutional; and recommended that an injunction issue (R. 299). Both sides filed exceptions to the Master's report, the plaintiff to the findings of the differential and the defendant to the refusal to find and to the conclusions of law (R. 306-311).

The plaintiff then moved in the District Court for confirmation of the report and the defendants opposed the application. The District Court confirmed the findings of fact made by the Master; made two additional findings (71 and 72) to the effect that the independent milk could not be sold at the same price as the well advertised and that consumers when offered both at the same price preferred the well advertised brands; overruled the Master's conclusions of law; made its own conclusions declaring the provision constitutional and denying the prayer for an interlocutory and a final injunction; and dismissed the bill on the merits (R. 320-322). The plaintiff now appeals to this Court. The opinion of the District Court, which is printed in the record (R. 312-320), is reported in 11 Fed. Supp. 599.

The plaintiff several times in the course of its brief in this Court assails the findings without examining or weighing the evidence supporting them. For example, at page 7 of its brief, the plaintiff states that the differential

findings were the subject of a mass of conflicting evidence and if taken without appropriate qualifications are misleading "and clearly contrary to the evidence". Again, at page 48, it states that the Master "extricated" these findings from "confusion" and that they do not amount to a clear showing of a differential. Since the plaintiff does not deign to consider the evidence upon which these findings are based, we have limited our survey of the facts to the brief sketch above given.

The Questions Involved.

Three questions are presented by this suit: (1) whether Section 258-q is constitutional; (2) whether the plaintiff has shown such damage as to entitle it to injunctive relief; (3) whether the plaintiff is estopped from maintaining this suit.

(1) On the question of constitutionality, it is only necessary at this juncture to remark that this Court when the case was here before did "not pass upon the ultimate question of the constitutionality of the statute" (293 U. S. at p. 213). This Court's answer to the defendants' argument "that the fixing of the differential was an effort to continue a condition which had obtained before the Milk Control Law was enacted; that, previously, milk of the independent dealers had sold at lower prices than the milk of the well known brands; that in establishing price control, the Legislature sought to preserve opportunities in competition which in actual practice the independent dealers had thus enjoyed and to prevent their trade from being destroyed by the operation of a scheme of uniform prices" (p. 207) was: "The factual basis of this contention is disputed and there are no findings disclosing it. Appellant asserts that there was not at any time any customary or accepted difference in price between the milk sold by it under its trade name and the milk of its competitors who are now favored by the fixed differential.

* * * For the present purposes, it is sufficient to say that these arguments are addressed to particular trade conditions in the City of New York, which largely lie outside the range of judicial notice" (p. 208). The tenor of the whole opinion, as we read it, does not preclude the conclusion that if the Court had found this "factual basis"—the pre-existence of a differential—it would have declared the provision constitutional and affirmed the decree of the lower Court.

(2) On the question of damages, the defendants will contend that the plaintiff has not shown such damage traceable to the differential as to entitle it to relief in equity.

(3) On the question of estoppel, the defendants will contend that, having applied for and received a license, having availed itself for one year of the benefits of the law and having encouraged the crystallization of conditions under it, the plaintiff is estopped from questioning the constitutionality of the differential provision.

Facts.

A. Introduction.

"A serious decline in the price of milk beginning in the year 1931 resulted in producers receiving for their milk a price less than the cost of production. In order to meet the emergency created by this situation a joint legislative committee known as the Pitcher Committee was appointed by the New York Legislature by resolution adopted March 10, 1932 * * *. Early in 1933, the Committee made a report, subsequently printed as New York Legislative Document No. 114 of 1933, commonly called the Pitcher Report" (Finding 2, R. 282).

On April 10, 1933, the Legislature enacted what will here be referred to as the 1933 Milk Control Law (Ch. 158

of N. Y. Laws of 1933). It created a Milk Control Board to continue until March 31, 1934, with power to fix by official order the minimum wholesale and retail prices to be charged for milk handled within New York State for fluid consumption, including prices to be charged by milk dealers to stores and the prices to be charged by stores to consumers except for consumption on the premises. In 1934 the Legislature re-enacted for a year substantially the same provisions in what will here be referred to as the 1934 Milk Control Law (Ch. 126 of N. Y. Laws of 1934). The 1934 Law is continued in effect until March 31, 1936, by Chapter 10 of N. Y. Laws of 1935. Testimony concerning the hearings, discussions and debates relating to the amendment and passage of these bills was given by legislators and others and is covered by the findings and discussed in detail later in this brief.*

The provision which the plaintiff challenges in this suit is the last sentence of Section 258-q of the 1934 Law, which is substantially a re-enactment of Section 317-c of the 1933 Law. It reads as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three, has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

---

* The admission of this testimony was clearly proper. "While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon the general purposes and the evils which it sought to remedy" (*Humphrey's Executor* v. *United States,* 295 U. S. 602, 625). No official records of these hearings, discussions and debates were kept (R. 304).

On May 5, 1933, acting under the differential provision of the law, the Milk Control Board by order designated the plaintiff, Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company as dealers having well-advertised trade names for the purposes of the differential. The order, unamended, is still in effect and the plaintiff has made no objection to being included (Finding 45, R. 292). At all times while minimum prices were fixed, "bottled milk of the independent dealers has been sold to and by stores in New York City at 1¢ per quart below the price of the bottled milk of the plaintiff and other well-advertised dealers" (Finding 46, R. 292).

In May of 1933 the plaintiff filed an application for a license under the 1933 Milk Control Law. In the application, "plaintiff agreed to comply with all rules and orders to be made by the Milk Control Board. On August 15, 1933, a license was issued to the plaintiff which expired March 31, 1934. During the continuance of the 1933 Milk Control Law for a period of nearly twelve months, plaintiff, without formal protest, sold milk under the competitive conditions established by the differential provision.

"At no time during the period when the 1933 Milk Control Law was in effect did the plaintiff institute any action or proceeding with reference to the differential provision" (Finding 50, R. 293).

"Until June 1, 1933, bulk milk could legally be sold through stores in New York City and a large amount of Grade 'B' milk was sold in that way. On November 20, 1931, a commission, appointed by the Department of Health of New York City to study the advisability of prohibiting the sale of bulk milk to stores for resale to consumers for consumption off the premises, recommended that the sale of such milk be prohibited. Pursuant to such recommendation, the Board of Health of the said City thereafter made an order to become effective January 1, 1933, prohibiting the sale of bulk milk to stores for resale to consumers. The effective date of said order was subse-

quently deferred until June 1, 1933" (Finding 25, R. 287-288).

"In November, 1931, the majority of the independent dealers were selling some bottled milk to stores" (Finding 16, R. 285). "The transition from the sale of bulk milk to the sale of bottled milk to stores in the said City began with the publication of the said Commission's report in November, 1931, and continued until the effective date of the ban on June 1, 1933" (Finding 26, R. 288).

"Before November, 1931, plaintiff's wholesale sales of bulk and bottled milk in New York City were approximately 80% bulk and 20% bottled. By June, 1933, the percentages were reversed" (Finding 33, R. 289).

B. The Background of the Legislation.

(a) The Metropolitan and New York City milk markets.

In 1933 there were approximately 83,000 farmers in New York State producing milk for sale. About 31,000 of them were members of the Dairymen's League Cooperative Association and about 15,000 were members of the Sheffield Producers Cooperative Association. The rest, some 37,000, were what are commonly known as "independent" farmers (Finding 4, R. 283).

About 50 percent of the milk produced by these 83,000 farmers is sold in the Metropolitan Market which, embracing all of New York City and certain adjoining parts of New York, Connecticut and Northern New Jersey, according to the census of 1930 had a population of over 10,000,000 (Findings 4, 3, R. 283). In November, 1934, the daily average number of quarts of milk received in the Metropolitan Market was 3,430,380 (Finding 51 and Table, R. 294, 300). About 70 percent of the milk received in the Metropolitan Market is New York State milk. On this basis, the New York State farmers supplied an average of 2,401,266 quarts per day and 72,037,980 quarts per month.

According to the plaintiff's statistician, 80 percent of the milk received in the Metropolitan Market is sold in New York City (R. 97). On this basis, there were sold in New York City in November, 1934, an average of 2,744,394 quarts of milk per day. Of this, between 900,000 and 1,000,000 quarts were sold in bottles to stores (Finding 22, R. 287), and the balance, more than 1,744,384 quarts, at "retail" (house-to-house delivery) and in bulk (Finding 14, R. 285). There are about 25,000 stores in New York City which buy milk for resale not to be consumed on the premises (Finding 15, R. 285).

The plaintiff purchases approximately 90 percent of its milk from Dairymen's League. Sheffield Farms Company obtains its supply from Sheffield Producers. The milk of the independent farmers is marketed through independent dealers (Finding 4, R. 283).

(b) THE PLAINTIFF: ITS ORGANIZATION, SIZE, OPERATIONS, ETC.

The plaintiff is indirectly owned and controlled by the Borden Company. The Sheffield Farms Company is similarly owned and controlled by the National Dairy Products Corporation. These two corporations, the Borden Company and the National Dairy Products Corporation, "having vast resources and widely scattered operations, play an important part in the handling of milk in this state" (Finding 21, R. 286).

"The plaintiff was organized in 1917 to take over the route department of the Borden Company. Since its organization, numbers of firms or businesses have been consolidated with it. The plaintiff also operates through several subsidiary companies. The plaintiff, the Borden Company, and their subsidiaries operate a chain of dairy stores (nine of them in New York City) and manufacture milk products (including cheese, condensed and evaporated milk, milk sugar, powdered and malted milk, casein and related products) in addition to engaging in the 'retail'

and 'wholesale' business above referred to" (Finding 21, R. 286-287).*

The plaintiff has 24 branches in the City of New York alone. It serves approximately one-half of the 25,000 stores in the city with some or all of their milk requirements (Finding 24, R. 287).

In October, 1933, there were 200 dealers engaged in the business of selling fluid milk in New York City. The four largest, the plaintiff, Sheffield Farms Company, Dairymen's League and M. H. Renken Company, together "sold a daily average of 1,638,248 quarts of milk out of a total daily average of 2,437,795, or 67.6%" (Finding 20, R. 286). These four had "89.2% of all the retail or house-to-house routes and 32.6% of all the wholesale routes" (Finding 20, R. 286).

The plaintiff and Sheffield Farms Company alone "have 85% of the retail or house to house business, divided about equally among them" (Finding 24, R. 287). In November, 1934, the store business of bottled Grade "B" milk was divided as follows: the plaintiff slightly more than 15 percent; Sheffield Farms Company slightly more than 17 percent; Dairymen's League approximately .5 percent; M. H. Renken Company approximately 2.5 percent; the independents the balance, approximately 65 percent (Finding 22, R. 287).

(c) THE PLAINTIFF'S WELL-ADVERTISED TRADE NAME, THE EXTENT AND METHODS OF ITS ADVERTISING, ETC.

The milk sold by the plaintiff has been sold under the trade name "Borden's" since 1857 (Findings 50, 51, R. 293). The plaintiff is one of the two largest and best advertised milk dealers doing business in New York City, the other being Sheffield Farms Company (Finding 24, R. 287). The milk sold under the trade names of these two

* Further details with reference to the organization, operations, etc., of these companies, both parent and subsidiary, is given at pages 173-180 of the Pitcher Report.

companies has come to signify extra value in quality and service (Finding 31, R. 289). The plaintiff between 1931 and 1934 expended $1,470,745.24 for advertising its products in New York City and vicinity alone (Finding 35, R. 289). Between the fall of 1932 and the fall of 1933 both the plaintiff and Sheffield Farms Company conducted an advertising campaign which the findings describe as having "extolled the merit of their own milk, and warned the public against buying milk of unknown brands available at a lower price" (Finding 34, R. 289).

Photostatic copies of 26 different advertisements appearing in various leading New York City newspapers were received in evidence (Defts.' Exs. 25, 27, R. 244-250, 252-272). Some of these advertisements are announced by the following legends: "Beware of Bargain Milk"; "Pennywise is an unwise policy with Milk"; "It Pays to Buy Borden's"; "She's Always interested in trying new dishes—But she doesn't Experiment with Milk"; "She Shops around for food bargains—but not for milk." Excerpts from two typical advertisements read as follows:

"THERE ARE NO BARGAINS IN BABIES.

A bargain is something you're willing to take a chance on. No parents are willing to take a chance with their children's health. . . . You cannot afford to take chances with milk either.

Yet if it is Borden's Milk you know that quality and purity and safety are there. . . . That is why the better stores sell not 'just any' milk, but Borden's."

"YOUR EYES CAN'T TELL THE DIFFERENCE.

Most women in New York would not think of buying 'loose milk' for their families to drink. Yet many of them today are buying this very same milk in bottles—frequently at bargain prices.

How much difference is there between 'just any' milk in a bottle and a bottle of Borden's?

Plenty. Borden's Milk comes only from carefully selected dairies. Borden's employs its own full-time staff of veterinarians and is the only company in

this district whose dairy inspection work is done only by veterinarians.

* * * * * *

These are a few of the reasons why more families, more doctors, more hospitals depend on 'Borden's' than 'just any' milk. . . ."

The originals of these advertisements were from 6 by 12 inches to 10 by 12 inches and most of them contained pictures or drawings flattering to the plaintiff's milk. One of them shows a picture of the grandchildren of the President of the United States with the legend that they have "cast their vote for a daily quart of Borden's Grade A Milk" (R. 252).

As will appear later, this advertising was unfair in its assumption of superiority and was the subject of the Legislature's consideration at the time it debated the 1933 and 1934 Laws. It is this advertising which the plaintiff in its brief seeks to justify as a mere attempt "to apprise the public of what, unquestionably, it was in the public's interest to know" (p. 43).

(d) The differential and its role.

The consumer responded gratefully to this act of disinterested public service and "stores found it to their advantage to carry those brands [plaintiff's and Sheffield's] of milk because they were so often called for by the customers" (Finding 31, R. 289). There was only one method of coping with that kind of competition: price appeal. And the finding is that that method was consistently resorted to by the independents.

"From November, 1931, to April, 1933, and for several years prior thereto, the independent dealers sold their bottled milk to stores in New York City for resale to consumers at one or more cents per quart below the price at which the advertised dealers were selling their bottled milk to stores in New York City" (Finding 66, R. 297).

And during the same period the stores did the same upon resale (Finding 69, R. 298).

We will be in a better position to appreciate the role of the differential if we examine its origin, history and rationale.

C. The History and Rationale of the Differential.

(a) The classified price plan: its partial application before the enactment of the 1933 Milk Control Law.

For years before the enactment of the 1933 Milk Control Law the plaintiff and the Sheffield Farms Company employed in the purchase of their milk from producers what was known as the classified price plan. Under this plan the milk was paid for on the basis of the use to which the milk was put by the buyer. Generally speaking there were four use classes. Class I, which included milk used for fluid consumption, commanded the highest price; Class IV, which included milk manufactured into cheese or butter, the lowest. The price received by the producers selling under this plan was a blend of the several prices and was known as the blended price (Findings 6, 7, 8, R. 283-284). The blended price received by the producers supplying Sheffield Farms Company was somewhat higher than the blended price received by the producers supplying the plaintiff (Finding 11, R. 284).

The independent dealers did not buy their milk under the classified price plan. They paid for whatever milk they purchased at a price substantially the same as the Sheffield blended price which, as we have seen, was somewhat higher than the price paid by the plaintiff (Finding 11, R. 284). Despite this, despite, that is, the fact that the independents were paying for all the milk they purchased, a price somewhat higher than the price paid by the plaintiff for all the milk it purchased and the same price for all the milk Sheffield Farms Company purchased, the independents were able to undersell the plaintiff and

Sheffield Farms Company. The Master found, we have seen, that for several years prior to April, 1933, the independent dealers sold their bottled and bulk milk at prices below those of the well-advertised milk (Findings 66, 70, R. 297-298).

(b) THE RESULTS OF THE PARTIAL APPLICATION OF THE CLASSIFIED PRICE PLAN: THE INDEPENDENT DEALERS ENJOYED AN ADVANTAGE OVER THEIR LARGE COMPETITORS.

One of the reasons for this ability to undersell is to be found in the uses to which the respective dealers put the milk they purchased. The independent dealers sold a greater proportion of the milk they purchased as fluid (milk and cream) than the large, well-advertised dealers who converted their so-called surpluses into butter, cheese, etc. (Findings 11, 12, R. 284-285). Milk sold as milk and cream brought higher prices to the dealer than milk manufactured into cheese and butter (Finding 10, R. 284). The result was that though the independents paid the same *average* price (to use an illuminating though technically not strictly correct term) for the milk they purchased, they received a higher average price upon its resale.

This, in part, explains their ability to maintain the differential which the Master found.* It is now pertinent to inquire why it is that the large, well-advertised dealers did not, like the independents, limit their purchases more nearly to the volumes which they were able to dispose of in liquid form instead of buying volumes greater than their needs for liquid purposes and being obliged to dis-

* The plaintiff's suggestion that now that the independents have been deprived of their advantage they can no longer undersell the large dealers, is without support in the record. The dilemma which the plaintiff raises under Point II (pp. 28-29) of its brief—that either the plaintiff is getting too much for its milk or the independents not enough—is based on an assumption that what is a reasonable return to the independents is also a reasonable return to the large dealers. The differences in capitalization, costs, fixed charges, overhead, salaries, etc., etc., point to the fact that this is not necessarily so. For example, one of the plaintiff's witnesses (Beales) thought that the independents could "operate a bottling business at a lesser cost than the large dealers" (R. 125). A smaller gross may yield the same net return to the independents or *vice versa*.

pose of the surpluses at prices below the liquid form. The findings and the Pitcher Report supply the answer. "The smaller dealers generally contracted for their minimum requirements and depended upon emergency purchases when threatened with a shortage" (Finding 13, R. 285). "The large distributor cannot do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice" (Pitcher Report, pp. 16-17, sub-finding [f]). In other words, these large dealers were subjected to an economic disadvantage because of the very fact that they are large—a somewhat paradoxical situation, since it is always their claim that their size is responsible for their advantages.

(c) THE DRIVE FOR THE UNIVERSAL APPLICATION OF THE CLASSIFIED PRICE.

So long as the market for milk continued to expand, this economic disadvantage from which they were suffering apparently caused little concern to the large dealers (Finding 28, R. 288). When the market began to shrink,* the disadvantage began to appear menacing. We get a partial, rather inadequate picture of what happened from Finding 12 (R. 285). It is there stated that the independent dealers "were able to engage very generally in price cutting which repeatedly forced the large dealers (including the plaintiff) to lower their prices so as to protect their business." What this means is, that in order to retain their volume (not mere proportion) of business in a shrinking market the large dealers sought to eliminate the effects of the differential which had always existed. Various methods of accomplishing that result were resorted to by them. They dispensed with the 5¢ bottle deposit requirement which all dealers had theretofore maintained on store sales (Finding 32, R. 289). Since this had the apparent** effect of reducing the price of their

* The extent of the shrinkage is indicated in Findings 51 *et seq.* (R. 293-298) and Pitcher Report, p. 80 *et seq.*

** At pages 38-40, *post*, we consider the true effect of this dispensation.

milk to approximately the level of the unadvertised milk (Finding 32, R. 289), the independents, in sheer self-defense, were obliged to widen the differential (Finding 68, R. 298). The large dealers then reduced prices. This they did chiefly at the expense of their producers.* As a consequence of the reduction of the prices to their producers, the blended price declined. The decline in the blended price, however, restored the advantage of the independents for it enabled them to reduce their prices still further. The victims of this competition were the producers who were soon "receiving for their milk a price less than the cost of production" (Finding 2, R. 282). They began to rebel,** and it became apparent that the large dealers would have to find some other means of eliminating the disadvantage they were suffering from. This means was the *universal* application of the classified price.

Accordingly, we find that one of the measures most urgently recommended to the Pitcher Committee by those buying under the classified price plan was that that method of purchase be applied to all dealers. For example, Mr. H. A. Cronk, the plaintiff's president, stated:

> "Each distributor, buying on this plan, would buy and pay for the exact amount of milk in each class to fill his market requirements. Since all buyers would assume the same costs for milk for the various uses, the success of each distributor would hinge upon his ability as a salesman, and his efficiency as an operator, providing they all had the same price for the milk" (Pitcher Report, p. 111).

Fair-sounding as Mr. Cronk's statement may appear, it however obscures the fact that the universal application of the classified price in effect meant that the in-

* The Pitcher Committee found that while the price paid by the producer for retail milk, of which the plaintiff and Sheffield alone sold 85 percent, declined 61 percent, the price received by the dealer declined 37 percent and the distributor's gross spread declined only 17 percent (Report, p. 15, subd. [e]). And beginning at the bottom of page 15 of its brief the plaintiff admits that the ability of independents to undersell the larger dealers forced the latter to lower the prices paid to their producers.

** The Pitcher Report, pp. 61-75, gives a graphic report of this rebellion.

dependents would have to pay for almost *all* of their purchases at a price which the large, well-advertised dealers paid for only a *part,* since the former sold in fluid form a much larger proportion of the milk they purchased than the latter, and would be deprived of the competitive advantage which their smallness bestowed upon them. Nevertheless, Mr. Cronk's suggestion that the remedy lay "not in scrapping the [classified] plan, but in its further extension"* prevailed. The bill which was drafted by the Committee and enacted into law empowered the Milk Control Board to fix the minimum prices to be paid to producers for milk depending upon its grades and *uses* (Chapter 158 of the N. Y. Laws of 1933, Section 312, subd. d), and such prices, depending upon utilization, have been fixed "ever since May 16, 1933" (Finding 47, R. 292-293).

(d) The origin of the differential provision in the Milk Control Laws.

The bill drafted by the Committee and introduced in the Legislature did not contain any provision for minimum prices to be paid by stores or consumers (Finding 39, R. 290). Consequently it contained no provision for a differential (Finding 39, R. 290). Both of these provisions (as well as others) were included by amendment later (Findings 39, 42, R. 290, 291).

Findings 40, 41 and 42 (R. 290-291) narrate in some detail how these provisions came to be included:

> "At meetings of a Committee held in the office of the Assembly Committee on Agriculture in the State Capitol on March 15 and 16, 1933, when a proposal to fix minimum prices to be charged by all dealers to stores was first discussed in connection with the pending Milk Control Bill, it was stated that uniform prices would destroy the business of all dealers except those which were well advertised.
>
> "The Committee was representative of dealers and producers, advertised and independent, and various members of the Legislature were present from time

* Pitcher Report, p. 112.

to time during its discussion on those two days. It was stated on behalf of the independent dealers that there was a custom for their milk to be sold through stores in New York City for a cent a quart less than the milk of the large advertised dealers, that they would lose their business if compelled to sell at the same price as the advertised dealers, and that this would mean a loss of outlet to their producers. Some of the newspaper advertising referred to in finding '34' was at that time shown to certain members of the Legislature.

"Subsequently, an informal conference of members of both houses of the Legislature was held to consider the pending milk bill. At that conference nearly all members were present, and Assemblyman Fitzgerald stated that the bill, as proposed, failed to maintain the competitive position then existing between the advertising and non-advertising companies, and, if adopted, would eventually raise prices to consumers.

"Thereafter the bill was amended in the Legislature to include a provision for the fixing of minimum prices; subsequently it was again amended in the Legislature to include a more detailed provision for minimum prices, specifically mentioning stores, and at that time the differential provision was also added."

The differential provision was continued in the 1934 Milk Control Law.* Finding 44 (R. 291-292) describes its re-enactment as follows:

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* The plaintiff states in its brief (p. 6) that the Milk Control Board in its 1934 report recommending the re-enactment of the 1933 Law made no recommendation with respect to the continuance of the differential provision. Apparently the inference the plaintiff seeks to have drawn is that this action of the Board constituted a condemnation of the differential provision. Such an inference is contrary to fact. What the Board did was to propose that the Law "be continued with such amendments as are proposed in succeeding recommendations." The "succeeding recommendations" did not propose the elimination of the differential provision; in fact they made no reference to minimum prices to stores or to the differential provision (Finding 43, R. 291).

The plaintiff also makes mention of the refusal by the Director of the Division of Milk Control to recommend the enactment of the differential for 1935. The Director, the fact is, made no recommendations with reference to the differential. He did make certain animadversions on it but the Legislature saw fit to continue it. His opinion as to the alleged difficulty of enforcing the provision has no more bearing on its constitutionality than the known difficulty of enforcing the Prohibition Laws had on theirs.

"On March 23, 1934, a hearing on the bill was held before the Senate and Assembly Committees on Agriculture. Witnesses at the hearing urged that the differential provision should be included in the Law if it were continued. It was stated that milk consumers in New York City had become accustomed to paying a cent per quart more at stores for milk of Borden's and Sheffield than for milk of independent dealers, and if all dealers were required to charge the same minimum price, the public would favor the brands of milk which were widely known and widely advertised; that the very existence of the independent dealers depended upon continuance of the differential provision; that they should be maintained as a gauge of what was economy in the milk business; that to continue price fixing without the differential provision would legislate out of business the independent dealers; that in such case the independent dealers would lose all the store business and their farmers would lose their outlet and the business would be absorbed by the big companies, greatly increasing cost of milk to consumers, particularly the poorer people who bought milk at stores, and putting all producers at the mercy of the three big companies."*

(e) THE NEED FOR THE DIFFERENTIAL PROVISION.

We are now in a position to appraise the merits of the plaintiff's charge, frequently repeated, that the differential is the result of pressure brought upon the Legislature by a small, favored, selfish group. Leaving aside the fact which the District Court remarked in its first opinion that "most legislation is the result of conflicts between economic or social interests, and the Legislature is the only place

* With reference to these findings the Master made the following observation: "There being no legislative report on the amendment, I permitted members of the legislature to testify to what was said in a legislative conference and committee on the subject of a differential (Findings 40 and 41). I tried to limit the evidence to facts, but these were scanty; the testimony shaded off into opinions, and afforded little reliable information as to the reasons for the amendment" (R. 304). To us it seems clear that findings which relate what the Legislature was told are findings of fact even though the things which were said were only opinions in the sense that they were not then and there established to be true, as they were later at the hearings. And it seems equally clear that the Master had in mind opinions in that sense when he made the comment quoted.

where they can be settled", what were the independent dealers to do? In response to pressure for which, we have seen, their large competitors were in no small measure responsible, the Legislature was about to enact into law the classified price which would deprive the independents of the advantage which buying at the blended price gave them. Now, in addition, the proposal was being made to deprive them of the advantage which selling at the differential gave them. Exacting as was the burden of requiring them to pay more—on the average—for their milk than the well-advertised dealers, to require them to sell at the same price as the well-advertised dealers threatened the destruction of their business and a loss of the outlet to the producers supplying them (Findings 40, 44, 71, 72, R. 290-291, 320-321). These were the considerations which moved the independent dealers and producers—the plaintiff's small, favored, selfish group—to press for the incorporation of the differential provision in the law. We find nothing sinister in this pressure.*

The importance of maintaining the differential is shown by what the defendants' witnesses, grocers and dealers, testified and the Court below found (Findings 71, 72, R. 320-321) actually followed, and, in the witnesses' opinion, would follow their attempts to get the same price for the milk of the independents as for that of the well-advertised dealers. The witnesses, as we show in the preliminary statement, testified and the Court found that when the attempt was actually made it resulted in a serious decline in the sale of independent milk and the witnesses were unanimous that the same result would follow any future attempts to get the same price.

At the bottom of page 17 of its brief the plaintiff, making a play on words, states that the effect of the differ-

* The Court below remarked in its opinion: "The Pitcher Report had indeed recommended minimum prices and had not suggested the need of protecting the 'independents'. That meant nothing; the effect upon them of fixing a minimum might not yet have been realized. The bill originally did not include any price fixing at all; and the 'independents' had no reason for alarm; but it was amended during its passage and with the introduction of a flat price they were naturally aroused and appealed for relief. Why there should be anything sinister about their success, passes our understanding" (R. 315).

ential provision was to give the independents a "monopoly" to make a price appeal, and adds: "and, to make such monopoly the more secure, the 'independents' obtained it not only against the appellant and the other advertised dealers, but also against all dealers entering the field after the date of the enactment of the 1933 Law." No reference is made to any finding or any other place in or out of the record to substantiate the charge that the independents and not the well-advertised dealers were responsible for the time limitation. Nevertheless the charge is repeated at pages 48-49 and in other places of the plaintiff's brief. The record will not support it. Moreover, since the exclusion of newcomers from the privilege of the differential benefits the well-advertised dealers as much as the independents, it is just as reasonable to conclude that it was inserted at the behest of the well-advertised dealers.

For the same reason there is no basis for the plaintiff's assertion (at p. 48) that the time limitation was inserted to enable the independents "to preempt a definite segment of the New York City market." It is just as reasonable to conclude that it was inserted at the instance of the well-advertised dealers for the purpose of limiting the number of their competitors who could take advantage of the differential.*

(f) **The primary purposes of the differential provision:** (1) TO MAINTAIN THE COMPETITIVE POSITION BETWEEN THE ADVERTISING AND NON-ADVERTISING COMPANIES; (2) TO STABILIZE CONDITIONS AMONG THE PRODUCERS; AND (3) TO PREVENT MONOPOLY.

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* At page 16 of its brief the plaintiff states that the independents were not content with the protection which the difference between the retail route and store prices afforded them, but "insisted that the Legislature enact the further difference which the appellant now attacks." If this statement is intended to suggest the inference that prior to the enactment of the Milk Control Law no difference between the retail route and store prices existed, it is contrary to the facts. Finding 29 (R. 288) states that "from 1931, until the enactment of the 1933 Law, prices of bottled milk sold by stores to consumers were lower than retail prices".

1. Against a finding of a pre-existing differential supported by evidence as overwhelming as is the evidence supplied by the present record, it is no longer possible to argue that the differential provision introduces into the milk industry an element which did not previously exist, an element which upsets conditions existing in a free market. It is now, on the contrary, evident that not to have enacted the differential provision would have resulted in just such an upset.

To preserve this pre-existing competitive situation was the first objective of the differential provision.

2. One of the fundamental aims of the Milk Control legislation was to insure an adequate and continuous milk supply to the consumer by so improving the farmer's economic status that he would be enabled to produce it. It was for that reason that the Milk Control Board was empowered to fix minimum prices to be paid to the producer (*Nebbia v. New York,* 291 U. S. 502). By fixing minima which were considerably higher than those previously prevailing, the condition of the producer was improved.

But this improvement depended, obviously, upon the producer's ability to market his milk. For no matter how high the prices are ordained to be, they can be of no benefit to the producer who has no outlet for his milk. It was equally important, therefore, to keep secure the producer's outlet.

Now the market of the many thousands of producers who were supplying the independent dealers depended obviously upon the continued existence of these independents. And the continued existence of these independents (whose business was almost entirely store business) depended, again obviously, upon their ability to undersell the well-advertised dealers. If the price to the consumer were to be uniform, if nothing was to be saved by buying the milk of the unknown independent, the consumer would naturally prefer the well-advertised brand of the large

dealer—the brand for which claims* of superiority were dinned into the ears of the consumer almost continuously by every form of advertising, laudatory and invidious, known to modern, high-pressure salesmanship. And the result of this artificially-created preference could only be the immediate decline of the business and ultimate elimination of the independent dealers and the destruction of the outlet of the producers who were supplying them.

Whatever may be said of the ultimate destruction of the entire independent market, there can be no doubt that the immediate result of the application of the universal classified price without the differential would be the loss of part of their market by the producers supplying the independents.** In other words, instead of improving and stabilizing conditions among the farming population, the law would have the effect of unsettling them still further. For whatever their conditions were before the law, the producers supplying the independent dealers at least had a market. The upshot of the whole business would be strikes, riots, danger of the loss of the milk supply—the very things the elimination of which prompted the legislation.

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* The findings show that there is no basis for these claims; see, for example, Finding 30 (R. 290). The testimony shows that the same milk sold to the plaintiff was sold by the League to independent dealers to be resold under unadvertised brands (R. 81).

In the note at page 43 of its brief, the plaintiff quotes warnings from the Pitcher Report that a prolongation of the conditions under which the farmers were paid less than the cost of production *"would* inevitably have an unfavorable effect upon the quality of the milk supply". These warnings obviously lend no support to the claim made in the plaintiff's advertisements that its milk actually *was* superior to that of the independents and permit no such implications. If such implications are permissible, the differential provision has its basis in a difference in quality and is on this ground also constitutional; if they are not, the warnings do not justify the character of the plaintiff's advertising. The Court below put the matter as follows: "If that reputation tells the truth, its milk is really of a different grade, and the classification was right; if it does not tell the truth and the plaintiff has been persistently misleading the public all along, certainly the Legislature might neutralize a spurious advantage in order to protect those who have not achieved a similarly undeserved reputation" (R. 316).

** Commenting on the plaintiff's claim (considered in detail hereinafter) that the independent producers would immediately find a substitute market among the well-advertised dealers, the Court below said: "Economic processes are not so automatic; there is a friction and a lag in them which cause most of our difficulties" (R. 317).

Confirmation that this fear is no mirage is to be found in several places. In the Court below the plaintiff stated in its brief (p. 13) that "for every quart of milk by which its business increased, the plaintiff would have to purchase an additional quart from *some* producer". That may be true, but, as one of the independent farmers (Pilger) put it: "There would not be less milk sold, but less of *our* milk would be sold. * * * I know the League has continuously insisted that more than half of their volume was surplus and they could immediately turn that into fluid channels, and we independents would be holding the bag with all our fluid milk and putting it into cheese" (R. 135).*

When asked what the result of such a situation would be, Mr. Pilger replied:

> "If you take the independent farmers and deprive them of their fluid market and drive them all into cheese, with the present misery they are laboring under and general difficulties during this period you will just have another one of those cases of hell let loose, and nobody can tell where we would wind up" (R. 136).

The suggestion by one of the plaintiff's witnesses, Mrs. Meyers, a strong League partisan, that the independents could feed their milk "to the calves, feed it to hogs" (R. 201) would hardly provide a way out.

To avoid this, by enabling the independent dealers to continue to undersell the well-advertised group and thus securing their market to the independent farmers, was the second objective of the differential provision.

In the Court below, as here, the plaintiff argued that the elimination of the independent dealers would not affect the independent producers. The reason given was, as we have seen, that "for every quart of milk by which its business increased, the plaintiff would have to purchase

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* Lazarus, a consultant in the industry of 22 years' experience (R. 137), testified that when the independent producers lost their independent (dealer) outlet, they "had to go to cheese factories or other lower forms to get rid of their milk" (R. 138).

an additional quart from some producer." But since the plaintiff and its ally, the League, were forever complaining of the surpluses with which they were burdened, it was easy to show, as Mr. Pilger did, that if the plaintiff's business were to increase at the expense of the independent dealers, the plaintiff would simply dip into its surplus for its increased requirements without having recourse to the independent producers who would in the meantime have lost their normal outlet and who, in Mr. Pilger's vivid phrase, would be left "holding the bag".

In this Court (at pp. 35-37 of its brief) the plaintiff undertakes to argue that this is not so because "during the period of lowest production" (p. 36) there is no surplus and "any appreciable increase in the appellant's business would necessitate the taking on of additional producers, since the appellant's supply in the short season would otherwise be inadequate" (bottom of p. 36). Leaving aside the fact that on the plaintiff's own showing the plaintiff would be obliged to have recourse to the independent producers' supply only in the short season, the record will not support the claim, advanced by implication in the plaintiff's argument just quoted, but explicitly at pages 9-10 of its brief, that the amount of milk produced in the period of lowest production is only adequate to provide for normal fluid demand; that is, that no surplus is produced in that period.

Mr. Pilger, we have seen, testified that the League (the plaintiff's source of supply) insisted that more than half of its volume was surplus (R. 135).* Nowhere in the record is this testimony contradicted. On the contrary, while the Pitcher Report shows that the League's claim is exaggerated, it also shows that the problem of surplus always exists, in periods when production is at its lowest as well as when it is at its highest. Speaking of this problem, the Pitcher Report states at page 39:

> "There must always be a *necessary surplus*. This is generally estimated at about 20 per cent.

* Mrs. Meyers stated that the League refused to take in additional members because it had "sufficient surplus to handle as it was" (R. 201).

> "To produce and handle milk suitable for use as fluid milk is far more expensive than to produce it for manufacturing purposes. This surplus must, therefore, be sold at a loss. But the problem is still more difficult. Farmers cannot know in advance just how much milk they will produce because the weather and other factors affect the cows. To be sure to have the *necessary surplus* farmers must take a chance of having still more if conditions should be favorable." (Italics in original.)

And Finding 9 (R. 284) states in part:

> "Under the best practicable adjustment of supply to demand, the industry must carry a surplus of about 20% in excess of fluid consumption because milk, an essential food, must be available as demanded by consumers every day in the year."

The claim advanced by the plaintiff is therefore contradicted by the record and it follows, we think, that any threat to the continued existence of the independent dealers involves the independent farmers equally with the dealers upon whom they are dependent.

3. Price control is emergency legislation. Presumably the time will come when such control will be abandoned and with it the protection of minimum prices to the farmers and maximum prices to the consumers. In other words, prices in both directions will again be determined by the least the farmer can be made to sell for and the most the consumer can be made to pay.

Now, obviously, in the absence of regulatory restrictions, one enjoying something of a monopoly is in a better position to pay as little and charge as much as he wants to than one who has competitors to reckon with. And it is clear that the universal application of the classified price without the differential would have a tendency, by reducing the business of and ultimately eliminating the independent dealers, to create just such a monopoly. To prevent the elimination of the independent dealers and the

creation of a monopoly was the third objective of the differential provision.

The plaintiff will say that the fear of monopoly is exaggerated and point to the last sentence of Finding 21 R. 287), taken from the Pitcher Report (p. 165), that "at no time in recent years has any one company had a monopoly or even near monopoly of the business of the distribution of milk in New York City," and to another sentence, quoted from page 173, that "competition in the business of milk distribution in most cities of the state is keen to the point of being wasteful and destructive."

However, the very next sentence points out that "there has been over a period of years a marked tendency toward fewer and larger distributors." And the figures given in the findings show that the fear is not exaggerated at all. Two companies now have 85 percent of the retail business and more than 32 percent of the store bottled "B" business (Findings 24, 22, R. 287). Four companies have 89.2 percent of the retail routes and 67.6 percent of all the business. An amalgamation of these businesses will make the fear a reality.*

The Master suggested in his memorandum (R. 302) that if such combination were attempted "the State could invoke the anti-monopoly provisions of the state statutes." General experience with the anti-trust laws has shown that the best way to prevent monopoly is to check its rise rather than attempt to split it up when full grown. Be-

* The Federal Trade Commission has recently, at the request of Congress, investigated the milk industry in certain localities and has reported that competition in the milk business has been eliminated in certain cities of Connecticut and various abuses created. According to the report, National Dairy Products Corporation, which indirectly owns and controls Sheffield Farms Company, acquired the two largest dealers in Hartford handling 39.3 percent of the milk, the remainder being divided among 140 small dealers. In New Haven it controlled 30.5 percent of the milk. "These figures," the report states, "show that, insofar as Hartford and New Haven are concerned, the National Dairies approaches a monopoly in those two markets."

Borden's subsidiaries were reported to sell 33.5 percent of the milk in Bridgeport, and a substantial percentage in Norwalk (House Document No. 152, 74th Congress, First Session, dated April 5, 1935, particularly pp. 40-43).

sides, there is nothing in the policy of the law to limit the State to one approach to the problem.

> "* * * Concentration of economic power has generally been watched with a jealous eye in this country. To prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way; and in this instance competition between the four 'well-advertised' dealers might be thought not enough security. Many are fearful of hidden arrangements which may be made when the field is narrowed to a few. Often such suspicions are unreasonable, but they are part of that stock of beliefs on which a legislature is justified in acting. * * *" (*Borden's Co.* v. *Baldwin*, 7 F. Supp. 352.)

Summary of Argument.

POINT I—The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary nor unreasonable.

POINT II—The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity.

POINT III—The plaintiff is estopped from attacking the constitutionality of the differential provision.

POINT I.

The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary nor unreasonable.

The device of classification, with the application of different regulations for different classes, is a common device of the law. "Classification is the most inveterate of our reasoning processes" (*Truax* v. *Corrigan*, 257 U. S. 312, at pp. 337-338). The "State has a broad discretion in classification, in the exercise of its power of regulation" (*Borden's Farms Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, at p. 210). Exactness in classification cannot always be obtained, and a tendency to fairness is enough, as is illustrated by *Singer Sewing Mach. Co.* v. *Brickell* (233 U. S. 304). The classification is valid unless it is "without any reasonable basis" and one who assails the classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary" (*Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, at pp. 78-79). The statute is good so long as it does not "preclude the possibility of a rational basis for the legislative declaration" (*Ohio ex rel. Clarke* v. *Deckeback*, 274 U. S. 392, at p. 397). "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction" (*Bd. of Tax Comrs.* v. *Jackson*, 283 U. S. 527, 537). The thought that runs through all the cases, like the burden through a ballad, is that all that a classification needs to sustain it is a showing that it rests upon some rational basis (cf. *Nebbia* v. *New York*, *supra*).

In its opinion remanding this case, this Court did not reject this test. "* * * After a full showing of facts, or

opportunity to show them, it may be found," it wrote, "that the burden of establishing that the classification is without rational basis has not been sustained" (at p. 210). Moreover, as we have already had occasion to remark, this Court did not suggest that such a rational basis was absent in this case. All it held was that since the "rational basis"—the pre-existing differential—for the classification here "is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings" (at p. 210).

It is against the background of these principles that the rationality of the differential provision must be judged.

A. This Court, we have said, left undecided the question whether a finding establishing the pre-existence of a differential would constitute the rational basis needed to support the provision under attack. But though the question was left undecided, we think the opinion contains a clear indication of what the decision now ought to be. As we read the opinion, this Court felt unable to uphold the provision as "an effort to continue a condition which had obtained before the Milk Control Law was enacted" (at p. 207) only because the record before it lacked the "factual basis" for such a view, and the chief, if not only, purpose for which the case was remanded was to discover whether the "factual basis" actually did exist. On a record which shows it to have existed, we think the provision should be sustained.

While it is true that the plaintiff at some points (notably under Point I, pp. 26-28, of its brief) argues that the provision ought to be condemned irrespective of whether a differential did or did not pre-exist, at other points (notably under Point III, pp. 30-33, of its brief) it argues that the differential which the Master and the Court below found is no differential at all, or, in the plaintiff's language, that the practice of the independents to sell below the well-advertised dealers was not so estab-

lished as to render it a "competitive precedent" sufficient to justify the enactment of the differential provision.

The first of these arguments has already been rejected by this Court, since, if it had been approved, this Court would not have remanded the case for proof, but with a direction that an injunction issue. This argument therefore needs no further consideration. The second of these arguments consists, as somebody has remarked, of an attempt to take the edge off the differential findings and requires examination.

Reversing the order in which the argument appears under Point III (pp. 29-33), the first part of it runs as follows: Up to November, 1931, when the Report proposing the abolition of bulk milk was published, the market was predominantly a market for bulk milk;* the market for bottled milk was a quality market (plaintiff's brief, p. 32); "it is to be inferred" that the purchases of bottle milk in stores during that period were merely "extra" and "casual"** and "insofar as the dealers were concerned bottled milk sold through stores was a nuisance" (plaintiff's brief, p. 8); therefore, "any competitive difference in price which may have existed in the old market [that is, the market before November, 1931] was no more a precedent for the statutory differential than a similar competi-

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* Finding 16 (R. 285) shows that in 1930 approximately 25 percent of the milk sold through stores was bottled milk (7.5 percent in bottles as against 23.6 percent bulk). Assuming that the total sales through stores in 1930 were no greater than in November, 1934, when, according to Finding 22 (R. 287), approximately 1,000,000 quarts of milk were sold through stores per day, bottle sales through stores in 1930 were approximately 250,000 quarts per day.

** The plaintiff apparently bases this inference on the statement at page 8 of its brief that "the price of bottled milk was generally the same in the stores as it was on the dealers' retail routes." Aside from the fact that the Pitcher Report (Table 95, p. 248) shows that except for 1929 there always was some difference in these prices during the period 1927-1932, this statement completely ignores the existence of the differential by virtue of which a consumer purchasing a bottle of independent milk in a store saved not only the difference between the store and route price, but also the difference between the well-advertised and independent price which did not extend to route deliveries (Finding 28, R. 288).

tive difference in Philadelphia would have been" (plaintiff's brief, bottom of p. 32).*

This part of the argument ignores three vital elements in the situation prevailing in the "old" market and slurs a third. It ignores the facts that 250,000 quarts of bottled milk were sold through stores daily in that market (a quantity for which "extra" and "casual" purchases cannot alone account), that "the majority of the independent dealers were selling some bottled milk to stores" (Finding 16, R. 285) and that some of the largest of these independents, like Sunshine, were then selling bottled milk to stores exclusively, that far from being a nuisance, bottled milk composed all of their business (R. 127-128, 220); and it slurs the fact that a differential also existed with reference to bulk milk (Finding 70, R. 298).

The plaintiff argues that the differential on bulk milk is of no significance, because "it is the difference in price to the consumer that is vital, and there was none in the sale of bulk milk" (plaintiff's brief, p. 33). We should think that before control (the period of which we are now speaking), when the storekeeper was at liberty to buy at any price, the price from dealer to storekeeper was at least as vital from the point of view of the dealer as the price from the storekeeper to the consumer. And since in the sale of bulk milk the consumer could not exactly know what milk he was getting because it all came out of cans, it seems to us that it was the price to the storekeeper that was vital. The independents always had to undersell in order to sell at all.**

The second part of the argument runs as follows: After November, 1931, the market situation was highly abnor-

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* Nevertheless, the plaintiff, without showing that the conditions obtaining in other States are comparable to those existing in New York City, urges as somehow material to the present question Finding 48 (R. 293), consistently opposed by the defendants, that no other State has included a differential provision in its Milk Control Law.

** The defendants' offer to prove that a differential had also preexisted in relation to condensed and evaporated milk between the known and unknown brands was rejected (R. 195). Defendants' Exhibit 26 for Identification (R. 251), showing that such a differential existed, was excluded and the defendants excepted (R. 195).

mal; there were constant price wars; the plaintiff and the other large dealers were reluctant to go the whole way in meeting the price cuts of some of the independents (plaintiff's brief, p. 31); "the best it could hope to do would be to pursue the 'independents' down a price-cutting spiral, with the 'independents' always one jump in the lead" (plaintiff's brief, p. 13); but rather than pursue this futile course the plaintiff dropped the 5¢ bottle deposit; the independents then reduced their prices still further (plaintiff's brief, pp. 13-14); in short, "nothing approaching a stable price structure then existed"; therefore "it needs little argument to show that no competitive precedent for the differential can be found during the period of the price wars beginning in November, 1931" (plaintiff's brief, p. 30).

Leaving aside the fact that according to the plaintiff's principal witness competition and price wars always existed in the milk industry (R. 102), the record simply does not support the plaintiff's repeated assertion that the independents took the initiative in the price wars. In addition to the plaintiff's admission (at pp. 14-15 of its brief) that it made an effort to offset the advantage which the independents, we have seen, always enjoyed, the facts are that it was the plaintiff and Sheffield who dropped the deposit requirement, though the independents never did; it was they who entered upon an advertising campaign that no ethical business practice should countenance ever for a moment; it was they who were most emphatic in the recommendation that the classified price plan be made universal; and it was they who were most insistent that a ban be placed on the sale of bulk milk.

And it is not difficult to understand why all this should have been so. The plaintiff and Sheffield were in almost complete control of the retail field. Their position in the wholesale field was much less extensive, and more precarious. A shift to bottles was bound, they believed, to benefit them. The bulk of their business was bottled and they were best equipped to take advantage of any

increase. Besides, the prestige of their trade names did not loom so large in sales of loose milk. They were therefore very eager to have the ban imposed. When the ban was announced, they saw their opportunity to extend their hold and immediately set to work to do so. It is no doubt true that the banning of loose milk and the introduction of State control were merely coincidental. It remains true also that the agitation of these well-advertised dealers was conducted simultaneously on all fronts. At the same time that they were urging upon the Legislative Committee a scheme which would require the independents to pay more for milk than the blended price they themselves were paying, they were slandering their product in the public press. While they were carrying on these activities, they were adopting—purely as a measure of defense, the plaintiff would have us believe—the abolition of the bottle deposit. Truly these giants must have been sorely pestered by the little independents—the Legislature's darlings—to have been driven to such extreme measures of self-defense. Or is the word to be understood in the good old military sense that the best defense is an offense?

We think that the record establishes that it is the well-advertised dealers who are the aggressors in the conflicts which arise between them and the independents. The very institution of this suit seems to us only another operation in their offensive against their smaller competitors. It is now clear, we trust, that the enactment of the universal application of the classified price conferred an inestimable boon upon the hard-pressed well-advertised dealers. It is a fair assumption that if the choice were exigent, they would prefer the classified price plan with a differential rather than no classified plan at all—the Milk Control Law with the challenged section rather than no law at all. But the choice is not exigent; they see the possibility of having the classified price plan without the differential, the possibility of completely exterminating the enemy and securing the field to themselves. Hence this suit.

The Legislature, the testimony shows, was unwilling to approve such a maneuver. When the bill with the classified price but without the differential was before the Legislature, it proved unsatisfactory, and it clearly appeared that it could not pass unless something were done to safeguard the independent producers and dealers (R. 189). It was not until the differential was incorporated that the bill did pass (R. 189-190). Nevertheless the plaintiff insists under Point X of its brief (pp. 52-53) that the differential is not an integral part of the law.

The differential is not only an integral part of the law, but its incorporation was a condition to its enactment. And the most convincing proof which could be mustered in support of the claim that the well-advertised dealers and not their small competitors are the aggressors in this war is the fact that the former, while clinging to the great benefits the Legislature bestowed upon them, do not hesitate to resort to every available means to deprive the latter of their protection even if that involves overriding the clearly expressed intentions of their benefactors.

The plaintiff states that "nothing approaching a stable price structure then existed" (appellant's brief, p. 31). The Master has indeed found that there was "widespread price-cutting", "a steadily declining price level" and "wide variations" in prices (Findings 26, 67, R. 288). Below we show what these actually amounted to. But, giving them the most calamitous import here, it still does not mean that there was no established differential.

What price-cutting, price variations and a declining level mean is simply this, that prices kept changing because they kept steadily declining and that they varied frequently. But that, we repeat, does not exclude the existence of a more or less uniform price difference between the well-advertised and the independent milk which the Master found (Finding 66, R. 297). What happened, as we suggest above, is that when the plaintiff dispensed with the bottle deposit or reduced its price, the independ-

ents were obliged to inaugurate a compensatory drop in their price. Thus prices kept changing by declining, but the differential was maintained.

We find confirmation of this conclusion in the plaintiff's insistence that it never did go as far in reducing prices as the independent dealers (plaintiff's brief, pp. 13, 31). Indeed not; the independents could not permit it. Their entire existence depended upon the differential and they were bound to maintain it at all hazards.

We have said that the Master found wide price variations, price wars and a resulting decline in prices.

As to the "wide variations", the plaintiff's own exhibits (Plff.'s Exs. 1, 5, 5-a, R. 223) show that the plaintiff's own prices varied as widely *before* November, 1931, as after.

As to the repeated price wars, the plaintiff's own witness, Mr. G. N. Allen, the executive secretary of the Emergency Committee bearing his name, testified that during the four-month period beginning September, 1932, when conditions were supposed to have been most "chaotic", and during which time he and his associates made a thorough survey of the situation, only 10 of the 86 New York City dealers with whom the committee was in contact were engaged in price cutting (R. 153; Defts.' Ex. 12).*

As to the "resulting" reduction of prices from 13¢ to 6¢ or less, there is no warrant for concluding that these so-called price wars were alone responsible for the decline. The chief cause of the decline of all prices in this worst period of the world's worst depression was the unprecedented shrinkage of purchasing power (see Finding 5, R. 283).

Moreover, it is inaccurate to measure the price fall by (except for inconsequential sales) the highest price in November, 1931, and the lowest in March, 1933 (again

* Another of the plaintiff's witnesses, the superintendent of one of its branches, stated that in his district there was no price-cutting at all during this period (R. 266).

the same exception). Measured by the lowest in November, 1931, and the highest in March, 1933, the decline would be much smaller.

Finally, in *1932*, when according to the plaintiff things were most "chaotic", the plaintiff's total sales of bottled and bulk milk to stores were greater than even in *1929* (Finding 65, R. 297). Apparently this was the kind of "chaos" upon which the plaintiff thrived.

In support of its contention that no competitive precedent for the differential can be found in the period between November, 1931, and the introduction of milk control in April, 1933, the plaintiff points to Finding 32 (R. 289) that the dropping of the bottle deposit requirement by the plaintiff and Sheffield in July, 1931, was equivalent to a drop of approximately two cents in the price of their milk. The plaintiff makes this finding the basis for its argument that between July, 1931, and the fall of 1932, when a three-cent deposit requirement was restored, its prices were as low as the prices of those independents who had thereupon widened the differential from one cent to two cents (Finding 68, R. 298) and "actually lower" than the prices of the more conservative independents who allowed the differential to remain at one cent (plaintiff's brief, p. 31).

Passing without further comment the fact that when the plaintiff (ever so reluctantly, no doubt) abandoned the deposit requirement, it upset one of the most inveterate practices in the milk business (Pitcher Report, p. 257) and accepting for the moment the calculation that the cost of this measure to the plaintiff was approximately two cents and not, as we shall show, considerably less, the conclusion that the dropping of the deposit meant a drop in price seems to us open to question.

The dropping of the deposit requirement undoubtedly meant an increase in distributor's costs to the plaintiff; "whereas the number of trips per bottle with a deposit charge averaged over twenty, after the deposit charge was

removed, the average dropped to around four trips" (Pitcher Report, p. 257). But this increase in cost to the plaintiff did not mean that the consumer purchased the plaintiff's milk for less than he had been accustomed to pay; the consumer continued to pay for the plaintiff's milk as much as he had paid before the deposit requirement was abandoned. It is true that he was spared the necessity of making the deposit and the inconvenience of returning the bottle in order to have the deposit refunded, and no doubt this dispensation played a part in the calculations of some consumers. But to the habitual store purchaser, accustomed to the deposit practice which the Pitcher Report found had been almost universal (p. 257) and intent upon the saving that buying independent milk yielded, the independents' further reduction of their price, consequent upon the plaintiff's dropping of the deposit requirement, meant not a lowering of the plaintiff's price to the level of the independents, not a disappearance of the differential, but a widening thereof, a possibility for further saving and an additional inducement for the purchase of independent milk.

We have said that the dropping of the deposit requirement meant an increase in cost of considerably less than the two cents fixed in Finding 32. After the deposit requirement was abandoned, we have seen, the number of trips per bottle dropped from an average of twenty to an average of four (Pitcher Report, p. 257). Since it is conceded that a bottle costs no more than five cents, this means that whereas the bottle cost per trip before the deposit requirement was abandoned was one-quarter cent (5¢ ÷ 20 trips), the cost thereafter was one and one-quarter cents (5¢ ÷ 4 trips). The Pitcher Report (p. 257) therefore concludes that "this meant an added cost of nearly one cent per quart in the cost of distributing milk through stores"—an added cost of nearly one cent to the plaintiff and not a decline of approximately two cents in price to the consumer.

The only proof which the plaintiff cited in support of Finding 32 was an isolated remark by one of the independ-

ent dealers that dropping the deposit requirement "had the same effect as if they dropped the price of milk around 2¢ a quart, close to it" (R. 214). In the first place, it is obvious that this dealer was merely expressing an individual, highly speculative opinion; "6½¢", he said, "might be a higher price than 8¢ for milk when you charge a 5¢ deposit" (R. 112). In the second place, he was uncertain as to its effect even in his own business—"whether it brought us 8 or 9 or it brought us in that period 6½¢" (R. 114). This, it seems to us, is an exiguous base upon which to rest a finding that contradicts not only all the known facts, but also the expert conclusions of the Pitcher Report.

Our analysis of the plaintiff's argument has established, we think, that a "competitive precedent" for the differential provision existed both before and after November, 1931, that, in other words, the differential the Master found was a true differential and not the formless, chaos-enshrouded configuration the plaintiff has striven to depict. For the reasons stated, we think that this differential alone justifies the affirmance of the decree.

B. The Master stated that the differential provision "has no relation to any of the objects or purposes for which said law was enacted" (Conclusion of Law 2, R. 298). The plaintiff in the heading of Point II (p. 29) states that it is directly at variance with them. We think that this Court will experience no difficulty in discovering a harmony between them.

The Legislature, we have seen, was told that the adoption of the law without the differential "would mean a loss of outlet to their [independent] producers" (Finding 40, R. 290-291) and that "their [independent] farmers would lose their outlet" (Finding 44, R. 291-292). There is nothing illegitimate, we take it, in attempting to prevent such a consummation. Here then, it would seem, is at least one purpose which the Legislature might strive to serve. The Master, however, stated in his memorandum

(R. 305) that "the voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." The Court below disagreed with the Master and made findings (71, 72, R. 320-321) tending to show that the elimination of the differential would eliminate the independent dealers and in that way seriously affect the independent producers. To us the soundness of these findings seems beyond question.

In the first place, the effect of minimum prices without a differential is self-evident. Who, except for possible sentimental reasons, as one* of the plaintiff's witnesses no doubt jocosely suggested (R. 93), would prefer to buy "Cato" milk rather than "Borden's" or "Sheffield's" unless something were to be saved by it? The fact that "the people in New York City who come to stores to purchase their bottled milk are, generally speaking, from the classes having the lowest income" (Finding 49, R. 293) is proof enough that so far as the independents are concerned their only chance of survival lies in their ability to continue their price appeal. In the second place, there is ample proof in the record to show what effect minimum prices without a differential would have. Numerous witnesses, grocers and dealers, testified that when they attempted to get the same price for independent, unadvertised milk they were unsuccessful. One dealer lost in a short time "approximately 30 to 35%" of his business in the attempt (R. 115); another "in a period of a couple of weeks * * * lost 20 to 30%" of his business (R. 120-121). Many grocers testified that they tried to get the same price but failed and that if they repeated their attempts they would fail again. Since the matter is covered in the preliminary statement, we will refrain from giving any further details of their testimony here.

It seems to us clear, therefore, that the interest of the independent farmer is intimately tied up with the in-

* Another one of the plaintiff's witnesses, when pressed for a reason, stated: "I don't know why the customer would buy bottled milk of the unadvertised brands at that time at the same price as Borden's. It is kind of hard to answer it; I would not know how to answer it" (R. 206).

terest of the independent dealer. And since it is admitted that "the chief purpose of the Milk Control Legislation was to improve the economic condition of the farmer-producer" (Master's memorandum, R. 304), it follows that the differential, insofar as it assures the independent farmer the same outlet for his milk that he had before, functions in that direction.

The differential has a tendency to improve the economic condition of the farmer in another respect. The finding is that "since the enactment of the 1933 Law the independent dealers have continued to sell for fluid consumption a proportionately larger share of the milk purchased by them than the well-advertised dealers" (Finding 47, R. 293). That means that now, since the universal application of the classified price, the independent farmer gets a substantially higher average price for his milk than the co-operative farmer, whereas before he got only the same price as the Sheffield farmer and a slightly higher price than the League farmer. While it is true that by fixing minima considerably higher than those prevailing before control the conditions of all farmers have been improved, this is especially true of the independent farmers because they have benefited most.*

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* In 1934 the prices paid by Ferndale, one of the larger independents, to its producers for 100 pounds of milk compares as follows with the prices received by the League producers (R. 220):

	Ferndale	League
January	$1.69½	$1.44
February	1.70 for part of month, 1.65 for balance	1.43
March	1.46	1.35
April	1.50½	1.30
May	1.50	1.28
June	1.58½	1.33
July	1.63	1.42
August	1.72	1.51
September	1.77	1.40
October	1.76½	1.44
November	1.93	1.64
December	1.96	1.69

From these amounts the League deducted 7 cents per 100 pounds for a certificate of indebtedness. Ferndale carries more surplus than most of the smaller independents (R. 220); consequently it is fair to conclude that the prices paid by the smaller independents were even higher than those paid by Ferndale.

We have said that the Legislature might legitimately strive to prevent the threatened loss of the independent farmer's market. Undoubtedly the test of the propriety of the purpose will depend not only upon the objective but also the means employed. We will consider below whether the Legislature might not have sought to accomplish its aim by creating a differential even if the finding of its pre-existence were less firmly grounded than it is or even if none had previously existed. For the present we wish merely to emphasize the fact that the Legislature had no need to go beyond incorporating into the statute that which already existed.

We are therefore, though for different reasons, in entire accord with the plaintiff that the present statute is manifestly different from those considered by this Court in the chain-store tax cases (*Tax Commissioners* v. *Jackson, supra; Ligett* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co.,* 294 U. S. 87). The purpose of those statutes was to foster equal opportunities by imposing newly created burdens upon those who had outstripped their competitors in the race. The purpose of the present statute is to foster equal opportunities by merely maintaining advantages which always existed.

In this setting the plaintiff's plea that the doctrine of those cases should not be extended to the present case (plaintiff's brief, p. 48) has a paradoxical ring. Upholding the present statute will not involve an extension of the doctrine of those cases; the truth is that this Court in the chain-store tax cases has gone much further than it needs to go in order to uphold the present statute.

C. We have, we believe, sufficiently elaborated the point that the differential does, so to speak, keep the relationship between the dealers in *status quo* and insures that when price control is abandoned there will still be the same competition that existed before. The result of the differential is therefore to check the tendency to monopoly which minimum prices without a differential would undoubtedly stimulate.

It follows that if it was the aim of the Legislature to prevent monopoly, the differential in this respect also is related to the objects and purposes of the law. The question therefore is, Did the Legislature enact the differential provision as a precaution against monopoly?

An examination of the provisions of the Act alone will not disclose such a purpose and this Court, when the case was here the first time, turning to the provisions of the Act for a criterion, naturally found no evidence of such a purpose there (pp. 205, 206). An examination of the findings will, however, supply any lack in the statute itself. The Legislature was told that if price control without a differential were adopted, it "would tend to create a monopoly which would eventually raise prices to consumers" (Findings 41, 44, R. 291, 292). Presumably the Legislature accepted and acted upon these representations. It believed that the danger of monopoly existed and that the differential provision is reasonably suited to averting it. The Courts will not lightly disturb the legislative determination upon either question.

What the Legislature did here, we have seen, has been merely to continue a condition which previously existed. Though it is unnecessary to a decision of this case, it will prove fruitful to consider whether the Legislature did not have the power to incorporate in the Law a differential even if one had not previously existed.

In *Fox* v. *Standard Oil Co.* (*supra*) this Court recognized the State's power to discourage bigness by favoring the small enterprise at the expense of the larger ones. Discussing the West Virginia graduated chain-store tax statute, it said:

> "Not only may it do this [tax the large chains more heavily than the small ones, and upon a graduated basis], but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry."

It is true that this was said in relation to chain stores. But the findings show that the plaintiff and Sheffield Farms Company, the two well-advertised dealers whose structure and organization are discussed, are in effect chains. Each is as much "a distinctive business species, with its own capacities and functions," as any chain, and the greater each becomes "the more far-reaching are the consequences, both social and economic," bound to become. Each enjoys at least a few of the chief benefits of such organizations: "abundant capital; standardization of equipment and display; superior management; more rapid turnover; special accounting methods; and a unified sales policy co-ordinating the diverse units." And to us there appears no reason why a power applicable to chain stores should not be applicable to organizations like the plaintiff and Sheffield Farms Company.

It is also true that this Court was considering a taxing statute and not one fixing prices. So far as concerns the question of power, it is, however, difficult for us to see why it should be more limited in one case than the other. If the State may discourage bigness by employing its power to tax, why may it not do so by employing its power to fix prices? Each (in the situation we are now considering) involves an imposition of a newly created burden, and since it lies as much within the State's competence to fix prices as to raise revenue, there would seem to be no basis for any distinction in the purposes for which the power might be employed.

The plaintiff makes the point that the effect of differential price-fixing is very different from that of differential taxation and on that ground insists that there is a distinction in the purposes for which they might be employed (plaintiff's brief, p. 47). It disagrees with the lower Court's observation in its first opinion that "the burden of an unequal tax is as effective a handicap in marketing the taxpayer's product as a duty to charge a fixed price". While it is true, it argues, that a taxpayer might be compelled to increase his price under the burden

of the unequal tax, that would be true only of those taxpayers who are unable to pay their taxes out of the profits which they already have; all others would have actual and effective options. On the other hand, under the compulsion of a fixed price the taxpayer has no option at all.

A realistic appraisal of the background of chain-store taxation reveals the invalidity of this argument. The avowed purpose of the chain tax statutes is to increase costs to the large units and thereby prevent them from underselling their small competitors. If that result does not follow it is only because the extra tax burden is not heavy enough. But there is nothing to prevent the States from increasing the burden sufficiently to achieve that result. When that is done the option the plaintiff speaks of will disappear.

The possible difference in effect which the plaintiff stresses arises then from the mere circumstance that the burden under the tax statutes may be insufficiently heavy and not from any distinction in principle between the two kinds of statutes.

We have said that a determination of the question whether the Legislature had the power to enact a provision for a differential even if one did not previously exist is unnecessary to a decision in this case. This is so because in this case a differential did in fact previously exist. For the same reason it is unnecessary to a decision in this case to determine the question whether the Legislature's powers were so limited that it could only enact the differential provision if its belief in its preexistence was so firmly grounded in facts that they would support a finding to that effect made in a court of law. Since, however, the Court below considered that question, we shall advert to it briefly.

The Court below, while approving the Master's finding that a differential did exist and stating that it thought the finding to be true (R. 315), nevertheless was of the

opinion that it was not necessary for the defendants to convince the Master or the Courts of the truth of its existence in order to justify the legislative action; it thought that all that was necessary for that purpose was to show "that reasonable people might have taken the view of the legislature", irrespective of whether it was demonstrably true or not. The reasoning of the Court below on this point seems to us irrefragable. We quote it at length:

> "* * * The question comes up for the first time whether when the court has undertaken an inquiry as to the facts on which the validity of a statute turns, the result is dependent upon its decision in the same sense as the result of an ordinary suit. If it finds to its own satisfaction that the necessary facts do not exist, is the law invalid? Or must it go further, as in the case of the choice of values, and find not only that the facts did not exist, but that reasonable people could not believe that they did? The question has an especial importance, because the Supreme Court has announced in this very case that the procedure here adopted ought to be generally followed. It seems to us that there can be no doubt that the second is the only tolerable doctrine. Otherwise the legislature's power would in effect be merely to enact general hypothetical propositions, which would become imperative only in case courts concluded that the facts on which their applicability depended actually existed. That is certainly not the traditional limit of a legislature's powers; frequently it institutes elaborate inquiry to learn the truth, just as it did in this case. The inquiry and its result are a part of its function, as exempt from judicial review as its social choices. If it has proceeded by commission or the like, the result may be more impressive, but it need not so proceed, and courts are as much bound in the one case as in the other. Therefore it is not necessary for the defendants to demonstrate the truth of the finding as to the differential or of the other findings, though incidentally we think that they are true. The relevant inquiry as to each is not what the master or we, or even the Supreme

> Court, may think the truth to have been, but whether reasonable people might have taken the view of the legislature" (R. 314-315).

In the present case, whatever may be said against the finding that a differential did in fact exist (in the sense that its existence could be established by proof necessary in a court of law), there can now be no doubt that the Legislature had reasonable ground for believing in its existence. This Court, when the case was last here, did not reject the test which the Court below suggested; indeed, in the state of record as it then existed, the test could not even be validly applied. Now that it appears that the Legislature had reasonable ground for believing the facts represented and the warnings addressed to it, now that it appears, that is, that the Legislature's action is not indefensible, the test becomes applicable, and, if sound, requires an affirmance without regard to the question whether a differential did or did not in fact exist.

POINT II.

The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity.

Whether the plaintiff has suffered any actual loss of business that can be traced to the differential is one of the issues most keenly contested in this case. The Court below was justified in saying that the evidence of injury to the plaintiff is not clear (R. 317). The plaintiff's proof failed to sustain its complaint as to this matter, and departed widely from it.

In the original bill of complaint and the supporting affidavit there appeared the following allegations:

> "By reason of the said Articles and the said Official Orders the plaintiff's market for the sale to stores in the City of New York of its fluid milk in bottles under its trade name 'Bordens' is and will be impaired to the extent of at least 25,000 quarts

daily. The plaintiff is now suffering, and will suffer each day that the said impairment continues, immediate and irreparable injury, loss and damage for which it has and can have no redress" (Complaint, par. 33, R. 14).*

"Deponent is informed and verily believes that by reason of the one cent price differential in favor of dealers not classified as having well advertised trade names, the sale of the plaintiff's bottled milk to stores has been impaired to the extent of at least 25,000 quarts daily. * * * Deponent is informed and verily believes that * * * house to house delivery business has been impaired to the extent of at least 50,000 quarts daily" (Affidavit of John F. Watson, R. 80-81, earlier record).

Other allegations in the same affidavit indicated that the figures alleged an actual net loss up to May 3, 1934, of 12½ percent on each class of the plaintiff's business, measured during the 13 months the law had been in effect, and due entirely to the differential. Upon the earlier argument those allegations were accepted as true, and as establishing a case of "immediate and irreparable injury." It is now apparent that the allegations were overdrawn, both as to the facts alleged and as to the prophecies made.

The proof now presented is that during the week of April 6, 1933, the plaintiff sold 999,955 bottled quarts of Grade "B" milk to New York City stores, and during the week of May 10, 1934, it sold 1,279,387 quarts (Finding 57, R. 295). Those figures are open to explanation, to be dealt with hereinafter; for the present the only point made is that the proof of damage cannot possibly support the original allegation. Moreover, the plaintiff's house-to-house delivery business did not suffer appreciably even from the general decline of milk consumption (Findings 53, 54, R. 294).

* The reference is to the earlier record before this Court, No. 296, October Term, 1934. The same allegation appears in the amended complaint, paragraph 46 (R. 16).

The fact is that the plaintiff's business as a whole shows no sign of being impaired from any cause except the general decline in milk consumption. Its constancy is the striking feature, presented by Finding 52 (R. 294):

> "Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 4.9% less than its sales in November, 1932. Total receipts of milk in the Metropolitan Market were 4.6% less in November, 1934, than in November, 1932. Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 1.6% greater than its sales in November, 1933. Total receipts in the Metropolitan Market were 1.9% less in November, 1934, than in November, 1933."

The defendants concede that the plaintiff would gain business from the unadvertised dealers if the differential were abolished, but obviously the plaintiff cannot rest its proof of damage upon that concession because it denies that there is any danger of its acquiring a monopoly. The plaintiff can make out its case with nothing except actual net loss of business, clearly due to the differential. The plaintiff infers those conclusions from certain findings made by the Master, but the inferences and some of the findings from which they are drawn alike are in dispute.

The plaintiff argues the matter as follows in its present brief (p. 18):

> "In the week of June 8, 1933, which was the first full week after the ban on bulk milk, the daily average of the appellant's sales of Grade 'B' bulk and bottled milk to stores in New York City dropped 21,054 quarts below its daily average during the week ending May 25, 1933, the last full week before the effective date of such ban (R. 297, Finding 62). * * * For the week ending November 8, 1934, the appellant's daily average sales of bottled milk to stores in New York City were 42,000 quarts below its daily average for the week ending June 8, 1933 (R. 297, Finding 63)."

The defendants take no exception to Findings 62 and 63, but they decline to follow the plaintiff in the inference that its differences in business measured by those findings are losses of business due to the differential. Several other things happened between the spring of 1933 and the fall of 1934 besides the differential, and some of them had just as probable a relation to the plaintiff's decrease in store milk business, whether bottled business alone or bottled and bulk business together. A notable example is that the sale of bulk milk to stores for resale to consumers was abolished on June 1, 1933; the fact that the plaintiff's combined bulk and bottled business declined at that period needs no other explanation. The plaintiff cannot justify its inference until it segregates the effects of those other factors, or at least shows that the advertised dealers lost store bottled milk business more than did the unadvertised dealers. Some of the factors other than the differential which singly or cumulatively would explain the plaintiff's apparent loss of certain classes of business described in Findings 62 and 63 are the following:

(a) *Seasonal variation.* According to Findings 57 (R. 295) and 63 the plaintiff's sales of bottled Grade "B" milk to New York City stores fell from 1,367,566 quarts in the week of June 8, 1933, to 1,073,348 quarts in the week of November 8, 1934, an apparent loss of 42,000 quarts per day, or about 21 percent loss. However, that figure becomes meaningless when considered in connection with Finding 64 (R. 297). Milk consumption always is low in November compared with the rest of the year, and the drop is entirely in store milk business; indeed, retail or house-to-house milk business is high in November. It can be deduced from Finding 64 that store milk business, considered by itself, is about 30 percent lower in November than in the rest of the year,* so the 21 percent drop in the plaintiff's

* The plaintiff's business is about two-thirds retail and one-third wholesale (Finding 54, R. 294). Milk business as a whole is about half retail and half wholesale (Finding 16, R. 285). Milk business as a whole is two

store business from June, 1933, to November, 1934, has no tendency to prove any but a seasonal loss of business.

(b) *Decreased consumption.* Milk consumption for each month of 1934 was substantially lower than for the corresponding months of 1933 (Finding 51 and Table, R. 293, 299-300). Obviously Findings 62 and 63 should be considered in the light of that general decline in milk sales. The plaintiff's brief concedes this (p. 20), but insists upon assuming that the decline in milk sales affected all classes of milk business in equal proportions. On the contrary, there is reason to believe that the entire decline was in wholesale business. Certainly there was no corresponding dcline in the plaintiff's retail milk business, whether in Grade "A" (Finding 60, R. 296), in Grade "B" considering the whole Metropolitan market (Finding 54, R. 294), or even in Grade "B" considering New York City alone (Finding 53, R. 294). Moreover, three factors in decreased sales of milk were peculiarly applicable to store and restaurant business:

(1) *Sales of relief milk.* During the last six months of 1934, the plaintiff acquired a new outlet for milk through public relief stations. That business was done under conditions which tended to compete with its store business (see Finding 59, R. 296), but was excluded from store business for the comparison between June, 1933, and November, 1934, in Finding 63 (Finding 59, last sentence, R. 296). By November, 1934, the plaintiff's public relief milk sales were averaging 24,868 quarts per day, and with its school

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to three percent low in November, but the plaintiff's business, because of its greater percentage of retail business, is two to three percent high in November (Finding 64, R. 297). If the extra one-sixth of wholesale business served by dealers generally makes their business five percent lower in November than the plaintiff's business, wholesale business by itself must be 30 percent lower in November than in the year generally. Implicit faith in this exact percentage is not recommended, but at least the seasonal variation as to wholesale business between June and November is real and substantial, and the percentage is a mathematical deduction from some testimony given on behalf of the plaintiff, as to the peculiarities of its business (R. 213, 217-218).

relief sales accounted for nearly all of its "loss" of wholesale business since the preceding November (Finding 58, R. 295-296). Because relief milk was a large factor in the plaintiff's 1934 sales, tending to supplant its wholesale sales but excluded by the Master from his comparisons (Finding 59, last sentence, R. 296), the "loss" of wholesale business ascribed to the plaintiff is apparent or theoretical rather than real. It is impossible to restrict the distribution of a cheaper milk supply or a free milk supply so that it will not tend, to some extent, to compete with ordinary sales. The plaintiff's principal witness conceded that it is probably true that sales of relief milk at 8 cents a quart have some tendency to compete with sales in nearby stores at 11 and 12 cents a quart (R. 217), and the opinion below makes a similar observation (R. 318).

(2) *Abolition of loose milk.* This step, effective on June 1, 1933, deprived the poorer people in New York City of a cheap food supply. This statement is not intended as a criticism of the step, but merely as a recognition of one very important aspect of it. Decreased consumption in 1933 and 1934 was primarily an expression of decreased purchasing power, and perhaps to some extent a protest against the price increase in milk brought about under the Milk Control Law. Either expression would affect store milk business primarily. The plaintiff should not be surprised that its increase in bottled milk sales to New York City stores, after the abolition of loose milk, was far below the loose milk business which was lost. That is the true explanation of Finding 62 (R. 297), so much relied upon by the plaintiff in its brief (p. 21). Abolition of loose milk, and legalization of beer, explain the difference between November, 1932, and November, 1934, relied upon at page 21. Those factors were peculiarly applicable to store and restaurant busi-

ness, and caused it to suffer the entire decline in consumption, rather than merely the equal proportion of decline assumed by the plaintiff's brief.

(3) *Sales of beer.* Beer became a lawful beverage in New York State on April 1, 1933, and was sold generally in restaurants, hotels and stores. New York City newspapers of March, 1935, carried a statement from the Brewers Board of Trade that in 1934 inhabitants of the City consumed 53 gallons of milk per capita, 22 gallons of beer and 20 gallons of coffee. The effect of beer consumption upon milk consumption, particularly sales of milk from hotels, restaurants and stores, is obvious, even if somewhat difficult to measure. One of the notable changes in the milk business in New York City, partly as a result of abolishing loose milk and partly as a result of legalizing beer, has been a flattening out of the midsummer peak in wholesale milk business.

Thus far, it is apparent that the plaintiff has failed to prove its case by the method of showing a loss of business and eliminating factors other than the differential which may have caused it. At page 21 of the plaintiff's brief it is conceded that the demonstration by that method is incomplete. So far as concerns that method, the plaintiff's failure is rather striking, because the other factors offer the more probable explanation of the "loss" shown. Accordingly, considerable importance attaches to testing the other possible method of proof on behalf of the plaintiff, along the line that advertised dealers lost a greater percentage of store bottled milk business than did the unadvertised dealers.

Upon this line the plaintiff was successful in obtaining Finding 23 (R. 287):

> "Since the enactment of the 1933 Law, the advertised dealers have had a smaller proportion relative to the independent dealers of the total sales

of bottled milk to stores in New York City than before the enactment of said law."

The position of the defendants is that the finding, although it may be true in a literal sense, is subtly worded to convey an inference which has no substantial support in the evidence and is opposed to the weight of it. This much is true, that the abolition of bulk milk became effective less than two months after the enactment of the 1933 Law, and at about that time there was some tendency for grocers and others who had been buying milk from unadvertised dealers to change to bottled milk supplied by the same dealers. The unadvertised dealers had more of the bulk milk business (compare Findings 16 and 33, R. 285, 289), and so they may have obtained more of the new bottle business during the conversion. That this tendency was owing to the differential, and continued evenly during 1933 and 1934 after its enactment, is the unproven inference which is written into Finding 23 by appealing to the "post hoc propter hoc" association of ideas.

The only support in the evidence which the plaintiff ever has cited for Finding 23 is the limited observation of a few storekeepers. They were called as witnesses for the defendants, primarily upon the issue that there was a differential between advertised and unadvertised brands of milk by custom before the 1933 Milk Control Law was enacted. Incidentally, without any importance being attached to it at the time, four of them made remarks which subsequently were cited by the plaintiff as the sole support for an important finding.

Mr. Herman Levine, manager of the United Grocers and Dairymen's Association, having 350 members, at one point in his testimony was asked in what proportion the members carry advertised and unadvertised brands, and said:

"The storekeepers whom I represent now carry advertised and unadvertised brands. They carry in a smaller proportion the advertised brands, in a

larger proportion the unadvertised in our stores, and the reason you know" (R. 143).

The plaintiff cited this testimony to the Master in support of the finding, notwithstanding that it is ambiguous, and the subsequent testimony of the same witness showed that he meant that the advertised brands *always* had a smaller sale in the stores than the unadvertised brands (R. 144).

Mr. Isaac Mandell, a grocer, testified that in 1930 and 1931 he was selling from 12 to 18 quarts daily of Borden's milk, and about 6 to 8 quarts of bottled milk of an unadvertised brand (R. 162); he also sold an unadvertised brand of bulk milk (R. 161). At the time of the trial he was selling only 4 to 6 bottles daily of Borden's milk, and about 150 bottles of an unadvertised brand (R. 161). This testimony also was cited by the plaintiff in support of Finding 23, but it does not seem to be very significant. Borden's did not lose any appreciable amount of business in Mr. Mandell's store; it merely failed to gain the new bottled business when the bulk milk business was abolished.

Mr. Sol Katz, a grocer and officer of a grocers' association, testified that before April, 1933, he sold 120 quarts daily of an unadvertised brand of bulk milk, 12 quarts of the same unadvertised bottled milk, and from 24 to 36 quarts of advertised bottled milk (R. 163). In early 1935 he sold 84 quarts of the same unadvertised bottled milk and 14 quarts of advertised bottled milk (R. 164). He said that the proportion of advertised and unadvertised did not change much during 1933 and 1934 (R. 164).

Mr. Max Title, another grocer, said that in 1929 and 1930 he used to sell about 24 quarts daily of advertised bottled milk, about 12 quarts of unadvertised bottled milk, and upwards of 120 quarts of the same unadvertised bulk milk. In early 1935 he was selling about 120 quarts of the same unadvertised bottled milk and about 36 quarts of advertised bottled milk (R. 165).

It could be expected that the witnesses produced by the defendants would reveal some preference for unadvertised milk, probably derived from or reflected in their business, but the testimony just summarized, even if it is assumed to be representative, affords a very weak foundation, and the only foundation ever referred to, for the important trade generality expressed in Finding 23. The only evidence of a general nature upon that issue also was supplied by the defendants' witnesses, and tends to disprove Finding 23. That evidence is as follows:

(a) In October, 1933, the four advertised dealers had 32.6 percent of the wholesale milk routes in New York City (Finding 20, R. 286). In November, 1934, they were selling at least 35 percent of the bottled milk to stores (Finding 22, R. 287). The plaintiff's brief denies that there is a necessary relation between number of routes operated and amount of milk sold (p. 19). There is testimony to the contrary (R. 169), and the zeal of milk executives for maintaining a high average load per route is well known.

(b) Some unadvertised dealers, and a majority of those in a list selected to be representative, have lost 20 percent or more of their sales to stores since enactment of the 1933 Law (R. 171, 174-176, 90, 110, 242).

Somewhat related to Finding 23 is Finding 17 (R. 285), to the effect that there has been a continuous trend since 1930 from retail sales of bottled milk to sales of bottled milk through stores. Undoubtedly the conclusion of the Pitcher Report, at page 163, that from 1930 to the abolition of bulk milk in 1933 there was an increase in the proportion of milk sold in bottles through stores, is correct; but there is good reason to suppose that store sales of bottled milk have not continued to gain since June, 1933, and on the contrary have suffered the entire decline in milk consumption experienced since that time. (See, upon that topic, the argument of this brief, commencing with the title "decreased consumption", *supra*, p. 52 *et seq.*)

The looseness of method, and uncertainty of data, underlying Finding 17, that there has been a constant trend from retail to wholesale selling, and Finding 23, that the advertised dealers have not retained their share of the wholesale business, is indicated by the first sentence of Finding 22 (R. 287), which does not attempt to tell closer than a range of 10 percent how much wholesale milk business there was in New York City in November, 1934.* The known factors were that 3,430,460 quarts of milk daily were received in the entire Metropolitan Market during that month (Finding 51, and Table, R. 293-294), of which 360,391 Grade "B" quarts were being sold in bottles to New York City stores by the advertised dealers.** All the rest leading up to Findings 17, 22 and 23 is no better than guesswork.

The plaintiff's brief (p. 19) criticizes the opinion below for drawing from Findings 20 and 22 a conclusion said to be inconsistent with Finding 23. The defendants submit that Finding 23 rests upon a weak foundation, and in any case is too vaguely phrased to say anything about sales in 1934.

It is respectfully submitted that the foregoing amply justifies the statement that one of the issues most keenly

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* The 1,000,000 figure used in Finding 22 is from a computation by Mr. Eastlack, the plaintiff's statistician, using 39 percent of 80 percent of 3,430,480 (R. 100). The 900,000 figure is 39 percent of 68 percent of the same base figure. There is no issue about the 39 percent, although its accuracy is not otherwise established. The issue is whether New York City consumes 80 percent or 68 percent of the milk consumed in the metropolitan market. The defendants support their preference for 68 percent by the following arguments:

(a) The population of New York City is about 69 percent of the entire metropolitan market, according to the 1930 census.

(b) In October, 1933, milk sales in New York City were 2,437,795 quarts per day (Finding 20, R. 286), which was 67.9 percent of total receipts for that month in the metropolitan market (see Finding 51, and Table, R. 293-294). Mr. Eastlack's computation finds that milk sales in New York City were larger in November, 1934, than the known figure for October, 1933, notwithstanding a considerable decrease in consumption according to figures for the metropolitan market as a whole.

** In November, 1934, Renken was selling 25,137 quarts per day, Sheffield 173,614, the League 5,234 (under the trade name of "Dairylea", R. 107), and Borden's (excluding small bottles and relief milk) 156,417 (Finding 58, R. 295-296).

contested in this case is whether the plaintiff has suffered any actual loss of business that can be traced to the differential. The plaintiff has not sustained the burden of proof upon that issue and has not shown such damage traceable to the differential as entitles it to relief in equity.

POINT III.

The plaintiff is estopped from attacking the constitutionality of the differential provision.

On May 10, 1933, the plaintiff made an application for a license under the 1933 Act and in its application agreed to comply with and obey the provisions of the Act. On August 15, 1933, a license was issued to the plaintiff (Finding 50, R. 293). By obtaining a license under the Act, it acquired a valuable property right, a right which prevented all unlicensed persons from competing with it in its business (*Frost* v. *Corporation Commission,* 278 U. S. 515). For an entire year it availed itself of the benefits of the Act, particularly the great benefit of the universal application of the classified price which deprived the independent dealers of the advantage theretofore enjoyed by them in being able to buy all their milk at the blended price. Its virtual joint control with the Sheffield Company of the retail milk business was undisturbed. No differential was imposed with respect to the sale of cream to stores with all the advertising advantages in favor of the plaintiff. These rights and benefits it enjoyed only by virtue of the Act and its agreement to obey all parts of it. The plaintiff is now estopped from attacking that part which it regards as a burden (*United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Booth Fisheries* v. *Industrial Commission,* 271 U. S. 208; *St. Louis Co.* v. *Prendergast,* 260 U. S. 469).

The plaintiff argued in the Court below that these cases have no application in the present instance because

the law which the plaintiff is now attacking is the 1934 and not the 1933 Law and that the plaintiff cannot be deemed to have estopped itself from attacking the 1934 Law by taking the benefits of the one enacted in 1933.

This argument cannot rest on any theory that the 1934 Law is essentially different from and not in reality merely a continuation of the 1933 Law. The second paragraph of the introductory statement of the findings states that "the 1934 Law (Ch. 126 of N. Y. Laws of 1934) re-enacted substantially the same provisions" contained in the 1933 Law (R. 281). The plaintiff in its brief to this Court on the first appeal (p. 4) stated that the two laws are "fundamentally similar statutes for the control of the production and marketing of milk in New York State." * And this and the Court below in their respective opinions indicated that they also took that view. Here we have an acknowledgment that, except for rearrangement and changes which are inconsequential in themselves and of no possible moment to the present litigation, the 1934 Law is merely a continuation of the 1933 Law.

So much for the law viewed as a whole. Coming to the portion attacked, we have not only the acknowledgment (again in the introductory statement) that Section 258-q (the differential provision in the 1934 Act) "is substantially a re-enactment of Section 316-c" (the differential provision in the 1933 Act), but we find that even the same language is employed.

The theory upon which the plaintiff's argument apparently did rest is that the plaintiff's application for a license and acceptance of the benefits under the 1933 Law "did not import any willingness on its part to give up any rights under further legislation on the same subject whether amending, continuing or radically altering that statute" (R. 306).

This contention ignores the vital difference between a mere extension of a statute and its radical alteration or

* In its present brief the plaintiff states that the 1933 Law "was in its broad aspects similar to the 1934 Law" (p. 2).

amendment. Suppose that instead of "substantially re-enacting" the 1933 Law in 1934, the Legislature had originally provided that the 1933 Law should remain in force for two years and had in 1934 rearranged and amended the 1933 Law into the form in which the 1934 Law is found. We do not doubt that it would be conceded that in such a case the plaintiff would be estopped from attacking the law in the second year of its existence even though it took the benefits under it only during its first. Why should the result be different because the Legislature adopted a different method?

Again, suppose, as the plaintiff insists is the fact, that the differential had not yet crystallized into an established practice at the time of the enactment of the 1933 Law. That means that, as the plaintiff admits (par. 22 of the amended complaint, R. 7), the differential which concededly existed at the time of the enactment of the 1934 Act became an established practice during the period of the plaintiff's acquiescence. That it would be dangerous to unsettle this practice—dangerous in the sense that if the differential is eliminated it would put the independents out of business, deprive their farmers of a market, cause strikes and riots and ultimately threaten the supply to the consumer—seems to us beyond dispute. Yet, if the plaintiff is to be allowed to attack the differential provision in the 1934 Law—the provision which its acquiescence in the similar provision in the 1933 Law made necessary—it means that it is in fact not to be obliged to accept the consequences of its own conduct—an immunity which it has not shown itself entitled to.

We think that once having agreed to be governed by certain regulations the plaintiff cannot so easily rid itself of the obligation to abide by them. This is utterly different from saying that it must also abide by any *other* regulations which the Legislature may impose. Such, as we see it, is the distinction between the mere extension of a statute and its radical alteration or amendment.

The Master found *Frost* v. *Corporation Commission* (*supra*) conclusive on the argument of estoppel. In that

case, by virtue of a statute of 1915, no one was permitted to operate a cotton ginning business in Oklahoma unless he obtained a certificate showing public necessity. In 1925 the statute was amended to provide that on the petition of 100 citizens and taxpayers stating that a gin was to be operated by them co-operatively a license should issue without a certificate of public necessity.

In 1926 the Durant Co-operative Gin Company, on a petition as required by the proviso, made an application for a license. The plaintiff, a licensed cotton ginner, offered to show a lack of public necessity. The defendant considered itself bound to issue the license nevertheless. The plaintiff then brought a suit to enjoin the defendant from issuing the license on the ground that the proviso denied him the equal protection of the laws.

This Court wrote as follows on the question of estoppel:

> "It is true that the appellant applied for and obtained a permit to do business under the statute to which it was sought to attach the proviso in question. Is he, thereby, precluded from assailing the proviso upon the ground that one who claims the benefit of a statute may not assert its invalidity? It is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding. *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225. But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said, upon the provisions of the statute * * *. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming nor denying, nor in contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of estoppel *in pais* or of a waiver of the right to maintain the constitutional challenge here made" (at pp. 527-528).

There was a dissenting opinion. The difference appears to have been, not in the principle involved, but in its ap-

plication. Because the proviso was not part of the original statute, this Court seemed to feel that the plaintiff had a right to proceed as though it had never existed. Here, of course, the differential provision always existed.

Throughout the hearings the plaintiff insisted that though it was the 1934 Law which was being attacked, nevertheless the conditions which existed at the time of the enactment of the 1933 Law were controlling. For, if it were the conditions existing at the time of the enactment of the 1934 Law which were controlling, there was no need to conduct a lengthy trial to find out whether a differential then existed, since then concededly a differential did exist (par. 22 of the amended cnmplaint, R. 7). Here we have an acknowledgment that the laws are the same and that any test applicable to one holds also for the other. Nevertheless, the plaintiff argued that, so far as the estoppel is concerned, the same test does not apply. We cannot agree with the plaintiff. Either the laws are different, in which case the hearings were unnecessary, an established differential in existence at the time of its enactment and the 1934 Law clearly valid; or they are the same, in which case what the plaintiff did under the 1933 Law is as pertinent to the issue of estoppel as though it had been done under the 1934 Law. This is a dilemma from which there is no escape.

CONCLUSION.

From the very commencement of this litigation the plaintiff has felt the necessity of attempting to explain away what to the ordinary citizen seems like an effort to increase milk prices by preventing those willing to buy independent milk from obtaining it a penny cheaper. In its advertisements announcing the institution of this suit the plaintiff stated:

> "In taking this action, we seek simply to make it possible for the public to buy milk of the highest

quality—Borden's Milk—at as low a price as any other milk" (Defts.' Ex. 27, R. 268).*

And this has been its public position ever since.**

Now, it seems fairly clear that the intent of these announcements was to convey the idea that all that the plaintiff is seeking is to remove the impediment which prevents it from reducing its price and so be enabled to sell as low as the independents. It seems quite clear, moreover, that that precisely was the impression which the readers of the advertisements carried away. But there is grave reason to doubt that such is the plaintiff's purpose.

The testimony shows that on three different occasions (July 14, 1933, August 23, 1933, and April 17, 1934) executives of the plaintiff appeared before the Milk Control authorities and urged that their price—the well-advertised price—for store bottled milk be increased to a point above the present price at which the not well-advertised milk is sold (R. 181, 181-186; Defts.' Ex. 23). The present price to the stores of the not well-advertised milk is 9¾¢; the price of the well-advertised milk on July 14, 1933, was 9¢; on August 23, 1933, 10¢; and on April 17, 1934, 10¢. In other words, at a time when the plaintiff was already getting more for its milk than the independents are now getting for theirs, the plaintiff was still complaining that it was not getting enough.***

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* The plaintiff in its brief below stated: "The way to increase the sales of milk and thereby benefit *all* producers is to permit *all* milk to be sold at the lowest possible price" (p. 17; italics in original). In its brief in this Court the plaintiff states: "The competitor with an established reputation is thus denied the right to meet the price of a lesser known rival" (p. 52).

** See, for example, the statement of Mr. Cronk in the press on the day of the announcement of the Master's report; for instance, N. Y. Times, June 21, 1935.

*** At the hearing of August 23, 1933, when the price of the well-advertised Grade "B" bottled milk to stores was 10¢, Mr. Harry A. Cronk, the plaintiff's president, testified as follows:

"The Chairman:

Q. As far as the Borden's Farm Products Company is concerned, it is operating at a loss in its Grade B business?

A. That's right" (R. 186).

Public announcements notwithstanding, the purposes of the present litigation are clear. The results, in case the plaintiff should succeed, are equally clear. We have already sufficiently emphasized most of them. One we have hardly mentioned, though it is perhaps as important as the rest. The independents sell about 65 percent of the 900,000 or 1,000,000 quarts sold daily to stores. On this basis, if the plaintiff succeeds in its aim, the people of New York City who can least afford * it will have to pay about $2,500,000 per year more for their milk than they are now paying.

Respectfully submitted,

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* A survey made by the Henry Street Settlement in 1934 covering 21,559 families in New York City shows that 13 percent of these families belonged to the $5-$10 a week income group and spent over 16 percent of their income for milk; and that 27 percent of these families belonged to the $11-$15 a week income group and spent 10 percent of their income for milk (R. 147; Defts.' Ex. 9). The survey also showed that as the price of milk increased consumption decreased (R. 147). Helen M. Harris, head worker of the Union Settlement, testified that if the differential were eliminated and all milk were sold at the higher, well-advertised price, "less milk of any variety would be consumed" (R. 196).

SUPREME COURT OF THE UNITED STATES.

No. 597.—October Term, 1935.

Borden's Farm Products Company, Inc., Appellant, *vs.* Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, et al. &c.	Appeal from the District Court of the United States for the Southern District of New York.

[February 10, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This cause is here a second time. The prior appeal was from a decree denying a preliminary injunction and dismissing the bill.[1] We reversed, holding that evidence should be taken, findings and conclusions made, and a decree thereupon entered. After remand the appellant amended its bill, the court sent the case to a master who made findings of fact, stated his conclusions of law, and recommended that an injunction be entered. The District Court accepted the master's findings, and found certain additional facts, but dismissed the bill upon the merits.[2] From this judgment the present appeal was taken.

As will appear by reference to our former opinion the appellant's complaint is that the fixing of a differential of not to exceed one cent per quart on sales to stores, in favor of milk dealers not having a "well advertised trade name", by the Milk Control Law of April 10, 1933 (reenacted by the laws of 1934, chapter 126), was an invasion of rights guaranteed by the Fourteenth Amendment. The bill, as framed when the case was here before, recited that the administrative authority which fixed the minimum price on sales to stores found the appellant and three other milk dealers in the metropolitan market had well advertised trade names and the statute permitted dealers not having such trade names to sell bottled milk to stores at one cent per quart less than the minimum which dealers with well advertised trade names were required to

[1] 293 U. S. 194; 7 F. Supp. 352.
[2] 11 F. Supp. 599.

charge, and also permitted stores to resell to their customers the unadvertised brands of milk at a price one cent per quart less than that at which the appellant's milk could be sold under the minimum fixed by the order. Resulting loss of business and irreparable damage were alleged.

In this court the appellees sought to justify the differential by the assertion that the statute was temporary in character, intended to relieve a temporary economic situation, and meanwhile to prevent monopoly of the business by dealers having well advertised names. In support of this position it was said that prior to the adoption of the Milk Control Act of 1933 independent dealers, so-called, had purchased from producers at prices lower than those paid by appellant and other purveyors of well advertised brands, and in turn charged less to stores than the appellant and others in its class. By the Milk Control Act the independent dealers were compelled to purchase from the farmers on the same basis as the well known dealers; and to deprive them of this advantage and in turn to compel them to charge the same price for their milk as the well advertised brands commanded would be to transfer all their customers to the owners of well known brands, and put them out of business. The appellant replied that, prior to the adoption of the Milk Control Law, there had been a threat to forbid the sale of milk in bulk to stores; this compelled the independents who had formerly sold mostly bulk milk to change to the bottled trade, and keen competition ensued between them and the owners of well advertised brands with destructive price cutting throughout the greater part of New York City, so that there was no fixed price for bottled milk sold to stores either by the independents or the well advertised dealers. In support of these contentions we were referred to statements found in the legislative report leading to the adoption of the Milk Control Law, and the injunction affidavits.

We held we could not take judicial notice of local trade conditions prevailing in the City of New York; as the case had been disposed of below on the allegations of the bill, we were not called upon to examine the affidavits submitted in support of the motion for injunction and to find the facts; and the constitutionality of the challenged provision should be determined in the light of evidence upon the matters as to which the parties were in disagreement.

By amendment the appellant added to its bill paragraphs to the following effect: Prior to 1932 less than one-third of the fluid

milk sold in New York was bottled, the balance being sold in bulk and under no trade name. Toward the end of 1931 a commission recommended that the sale of loose milk to stores be prohibited. The Board of Health made an order, effective January 1, 1933, the effective date of which was subsequently postponed to June 1, 1933, prohibiting the practice. By reason of the impending ban upon the sale of loose milk, dealers engaged in the sale of that commodity were forced to make a drastic change in their methods. The transition from the sale of loose milk to bottled, which began about April 1, 1933, and continued until June 1, 1933, engendered widespread price cutting and a steadily declining price level, and brought about unsettled market conditions and great variations in price. At no time prior to the effective date of the Milk Control Act was there any trade custom, practice, or usage whereby the bottled milk of dealers thereafter classified as not having well advertised trade names was sold to stores at a price different from that of the bottled milk of the appellant and others classified as having well advertised trade names. Before April 10, 1933, and thereafter, the appellant was in active competition with more than one hundred and fifty dealers in the sale of bottled milk to stores in the city. The appellant and others classified as having well advertised trade names sell approximately twenty-one per cent of the bottled milk sold to stores. The prices paid by dealers to producers under the Milk Control Law have been the same for all dealers no matter how classified. All bottled milk must have printed on the cap the name of the dealer distributing it. The services rendered by the appellant and by co-called independent dealers differ in no respect.

The assertions of shrinkage of appellant's sales to stores consequent upon the establishment of the differential were repeated and amplified in the amended bill. An answer was filed denying the allegations of the bill. Much evidence was received.

The findings of the master establish that the dealers having a well advertised trade name, of which appellant is one, are in keen competition with each other and with the independent dealers, and have no monopoly, nor anything approaching a monopoly, of the sale of bottled milk to stores. The findings further demonstrate that the good will incident to appellant's well known trade-name "Borden's" has been built up largely by advertising, and there is no finding that the appellant's methods in that respect, or its trade

practices, have been illegal. Grade B milk, with which we are alone concerned, must conform to standards of quality, purity and cleanliness prescribed by law, whether sold by appellant or by an independent dealer. The service rendered and the conditions of sale are the same for both. It is plain from these facts that the allowance of the differential cannot be justified as a preventive of monopoly or as a deterrent of illegal combination or illegal trade practices, or as a recognition of differences in the service rendered.

We are brought to the remaining issue of fact to resolve which the case was remanded. Was there a differential during a substantial period prior to adoption of the act between the price charged to stores by dealers having well-advertised trade names and that charged by those lacking this advantage?

The master's findings upon the point, though the appellant excepted to them, were adopted by the court below. They are to the effect that from November, 1931, to April, 1933, and for several years prior thereto, the independent dealers sold their bottled milk to stores in New York City for resale to consumers at one or more cents per quart below the price at which the advertised dealers were selling their bottled milk to stores in that city; and during the same years the stores were selling the independents' bottled milk to consumers from one cent to two cents per quart below the price at which they were vending the bottled milk of the advertised dealers. The District Court made additional findings, supplementing those of the master, that independent dealers on occasions before November 1, 1931, and until April 1, 1933, tried to sell bottled milk to stores at the same price as that charged by the appellant and another advertised dealer, and in each case were compelled by loss of business to resume their earlier and lower price; and during the same period customers when offered the several brands at the same price would usually take a bottle of the well-advertised dealer's milk in preference to that of an independent dealer. These findings of the master and the court disclose the circumstances in the light of which the appellant's claim that it was denied the equal protection of the laws must be considered. The appellant assigns them as error; but they are supported by substantial evidence and we will not disturb them.

We hold that the fixing of the differential in favor of the sellers of milk not having a well-advertised trade name, in the situation exhibited by the findings, does not deny the appellant equal protection.

The argument is that the classification is arbitrary since the statute puts the appellant and other dealers who have well advertised trade names in a single class solely by reason of the fact that their legitimate advertising has brought them good will. So, it is said, they are penalized for their business skill and acumen. The answer seems sufficiently obvious. In enforcing its policy of price fixing,—a temporary expedient to redress an injurious economic condition,—the legislature believed that a fixed minimum price by dealers to stores would not preserve the existing economic method of attaining equality of opportunity. That method was for the well-advertised dealers to rely on their advertising to obtain a given price, and for the independents to retain their share of the market, not by counter-advertising but by a slight reduction of price. The one expedient the law did not purport to touch; the other by fixing the same minimum for all dealers it would effectually destroy. In these circumstances, it was competent to the law makers to attempt, during the limited term of the legislative experiment, to preserve the existing relationship of advantage established by the past trade practices of the two groups. So to do, we must assume, was within the legislative power under the state constitution. No prohibition of the expedient is found in the federal Constitution, unless in the Fourteenth Amendment. We have held that article does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in the State of New York in 1933.[3] We now hold that to provide that a differential of one cent maintained by the independent dealers shall continue does not deny their advertised competitors equal protection. There was a plain reason for the classification. It was not merely that appellant had established a good will; it was that there had resulted a balance between that advantage and the resulting disadvantage to the unadvertised dealer,—a balance maintained by a price differential. To attempt the maintenance of that balance was to strive for equality of treatment, equality of burden, not to create inequality. To adapt the law to the existing trade practice was neither unreasonable nor arbitrary. The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry. The danger in such efforts always is that unintended dislocations will bring hardship to groups whose situation the broad

[3] *Nebbia v. New York*, 291 U. S. 502.

rules fail to fit. ' Where, as here, there is recognition of an existing status and an attempt to equate the incidence of the statute in accordance with it, we find a compliance with, rather than a disregard of the constitutional guarantee of equal protection. The appellant cannot complain if, in fact, the discrimination embodied in the law is but a perpetuation of a classification created and existing by the action of the dealers. In the light of the facts found the legislature might reasonably have thought trade conditions existed justifying the fixing of a differential. Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Company* v. *Marysville*, 279 U. S. 582, 586-587.

A second argument is that, instead of maintaining equality between the two groups, the act has destroyed it by unduly favoring the independents. The differential is said to inflict grievous injury and irreparable and continuing damage upon the appellant. We must look to the record to determine whether it supports the appellant's claim. The master made numerous findings touching the relative sales of bulk and bottled milk to stores by the two groups of dealers at various times before and after the adoption of the act, and in respect of appellant's share of that trade in comparison with total sales and those of its independent competitors. He also found: "Since the enactment of the 1933 Law, the advertised dealers have had a smaller proportion relative to the independent dealers of the total sales of bottled milk to stores in New York City than before the enactment of the law." But neither in his findings nor in his general discussion does he say that the smaller volume of appellant is due to the differential provision. He does state: "the voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." There is no fact finding of loss and damage to plaintiff from the differential. A conclusion of law is: "By reason of the differential provision, the plaintiff is now suffering, and will continue to suffer irreparable damage." After a full discussion of the master's findings the District Court said: "From all this it seems to us very doubtful whether the differential has really damaged the plaintiff at all." We have examined the findings and the evidence, and concur in the conclusion. Though appellant, at the time of the trial, had acquired a large experience

of the operation of the differential, its proofs and the findings based upon them, leave serious doubt as to the effect on the appellant's store trade of other factors, such as seasonal variation, the decrease in the consumption of milk in 1934, the change from loose to bottled milk in store distribution, and the sale of great quantities of so-called relief milk under arrangement with the public authorities. It has failed to show that as a result of the statute the independent dealers have gained trade at its expense, or that it has suffered substantial loss.

We have no occasion to determine whether the differential would become unlawful, and the appellant would be entitled to relief, if there were proof that in practice it produces such gross inequality, and so unnecessarily damages the appellant, as to shock the conscience.

Decree affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 597.—October Term, 1935.

Borden's Farm Products Company, Inc., Appellant, *vs.* Peter G. Ten Eyck, as Commissioner of Agriculture and Markets of the State of New York, et al., etc.	On Appeal from the District Court of the United States for the Southern District of New York.

[February 10, 1936.]

Mr. Justice McReynolds, dissenting.

Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and I think the challenged judgment should be reversed.

In *Nebbia* v. *New York,* 291 U. S. 502, 539, we stated reasons in support of the conclusion that the New York Milk Control Act of 1933 infringed the due process clause. We adhere to what we there said.

The present cause raises a distinct, although subordinate, question. Assuming that the general price fixing provisions of the Control Act are valid, do the provisions which permit other dealers to sell below the minimum price prescribed for appellant deprive it of the equal protection of the laws? The answer should be in the affirmative.

Rational classification, based on substantial differences, is within legislative power. An act which permits dealer A to sell at less than the price fixed for dealer B obviously denies equality; and in the absence of some adequate reason for different treatment, the enactment is invalid.

Here appellant differs from favored dealers only in that it possesses a well advertised brand, while they do not. And solely because of that fact, the Legislature undertook to handicap it and thus enable others profitably to share the trade There is no question of unfair trade practices or monopoly.

By fair advertisement and commendable service, appellant acquired the public's good will. The purpose is to deprive it of the right to benefit by this and thereby aid competitors to secure the business. This is grossly arbitrary and oppressive.

To support the legislation, it is said the Legislature believed that a fixed minimum price to stores would not preserve the existing economic method of attaining equality of opportunity. Apparently, this means that a dealer, who through merit has acquired a good reputation, can be deprived of the consequent benefit in order that another may trade successfully. Thus the statute destroys equality of opportunity—puts appellant at a disadvantage because of merit.

Merely because on a given date there were differences in prices under open competition, offers no rational reason for legislation abolishing competition and perpetuating such differences. The status existing under competitive conditions certainly is not preserved by destroying competition. Formerly, appellant had the right to adjust prices to meet trade exigencies and thus protect itself from loss of business. Now it must stand helpless while adversaries take possession of the field. It may suffer utter ruin solely because of good reputation, honestly acquired.